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1923—1929

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1922

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1922

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THE
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COMPARATIVE TABLES
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Hints for the use of the following Tables :—

• **TABLE No. I**—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1922 with corresponding references of the ALL INDIA REPORTER.

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TABLE No. I

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N.B.—Column No. 1 *denotes pages of* I. L. R. 46 BOMBAY.
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I. L. R. 46 Bombay = All India Reporter.

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N.B.—Column No. 1 *denotes pages of* OTHER JOURNALS.
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203	,, ,, 14	346	,, ,, 39	493	1923 ,, 16	720	,, ,, 211	872	1922 ,, 390
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214	,, ,, 18	351	1922 ,, 487	499	1922 ,, 2	729	,, ,, 387	885	1922 ,, 284
226	,, ,, 25	355	1923 ,, 29	502	,, ,, 440	734	,, ,, 215	902	,, ,, 438
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235	,, ,, 28	364	,, ,, 241	513	,, ,, 155	744	,, ,, 207	917	,, ,, 410

24 Bombay Law Reporter = All India Reporter—(*Concld.*)

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924	1922	B	386	998	1923	B	113	1153	1923	B	106	1231	1922	P.C.	247	1304	1922	B	451
925	,,	,,	383	1009	,,	,,	130	1157	,,	,,	63	1238	,,	,,	112	1308	1923	,,	170
928	,,	,,	42(	1029	,,	,,	85	1160	,,	,,	35	1245	,,	,,	120	1311	,,	,,	60
937	1922	P C	25	1037	,,	,,	66	1162	,,	,,	17	1251	,,	,,	304	1315	,,	,,	146
944	,,	,,	5	1040	,,	,,	79	1167	,,	,,	51	1257	,,	,,	107	1318	1922	,,	454
951	,,	,,	84	1049	1922	,,	361	1181	,,	,,	119	1268	,,	,,	281				
963	,,	,,	8(	1060	1921	,,	338	1191	1922	P C	69	1281	1923	B	145				
971	,,	,,	4(	1111	1923	,,	177	1197	,,	,,	115	1284	,,	,,	82				
974	,,	,,	5	1124	,,	,,	96	1209	,,	,,	201	1291	,,	,,	36				
978	1923	B	14	1140	,,	,,	125	1214	,,	,,	325	1296	,,	,,	90				
991	,,	,,	92	1150	,,	,,	74	1228	,,	,,	365	1302	,,	,,	44				

23 Cr. L J. & 64 to 68 I.C. = All India Reporter

Cr.L J & I. C.	A.I.R.	Cr.L.J & I. C.	A.I.R.	Cr.L.J & I. C	A.I.R.	Cr.L.J & I. C	A.I.R.	Cr LJ & I. C.	A.I.R.

Please refer to Comparative Table No. II in **A. I. R. 1922 Lahore.**

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1922, BOMBAY Section with corresponding references of other REPORTS, JOURNALS and PERIODICALS, including the Indian Law Reports.

N. B.—Column No. 1 *denotes pages of the* ALL INDIA REPORTER, 1922 BOMBAY.
Column No. 2 *denotes corresponding references of other* REPORTS, JOURNALS and PERIODICALS.

A. I. R. 1922 Bombay = Other Journals

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
1	24	BLR	287		67	IC	267	31	24	BLR	1		67	IC	230
	67	IC	219		47	B	174	F B	46	B	635		46	B	816
2	46	B	932	14	24	BLR	203		65	IC	600	46	24	BLR	272
	24	BLR	499		69	IC	13	32	46	B	871		67	IC	162
	68	IC	91	17	24	BLR	210		24	BLR	5		47	B	155
3	46	B	448		67	IC	280		65	IC	602	51	24	BLR	289
	24	BLR	83	18	24	BLR	214	38	24	BLR	45		67	IC	235
	67	IC	250	25	24	BLR	226		65	IC	640		46	B	758
5	24	BLR	252		46	B	687		23	Cr LJ	176	52	24	BLR	16
	67	IC	215		66	IC	315	39	24	BLR	46		46	B	592
	46	B	741	27 (1)	24	BLR	229		46	B	641		65	IC	758
8	24	BLR	264		66	IC	341		65	IC	637		23	CrLJ	177
	67	IC	43		46	B	716		23	Cr LJ	178	66	24	BLR	60
	46	B	736	27 (2)	24	BLR	232	41	24	BLR	239		65	IC	682
9 (1)	24	BLR	302		66	IC	320		66	IC	865	70	24	BLR	54
	46	B	823		46	B	710	42	24	BLR	50		65	IC	677
	69	IC	399	28	24	BLR	235		46	B	646	74	24	BLR	316
9 (2)	24	BLR	242	29	24	BLR	236		65	IC	638		67	IC	366
	66	IC	868		66	IC	815		23	Cr LJ	169		46	B	830
	46	B	722		46	B	803	44	24	BLR	295	75	46	B	567
11	24	BLR	196	30	24	BLR	245		67	IC	223		24	BLR	118
	77	IC	941		66	IC	872		46	B	806		66	IC	979
12	24	BLR	198		46	B	732	45	24	BLR	300	78	24	BLR	111

A I. R. 1922 Bombay = Other Journals—(*Contd.*)

A I.R.	Other Journals			A I R.	Other Journals			A I R.	Other Journals			A.I.R.	Other Journals		
	46	B	651		64	IC	78		23	BLR	779		23	BLR	1072
	66	IC	393		23	BLR	898	167	46	B	438	197	24	BLR	154
79	24	BLR	298	118	46	B	269		69	IC	91		67	IC	130
	76	IC	754		23	BLR	1013		23	CrLJ	651	198	46	B	221
80	24	BLR	292		63	IC	844		23	BLR	1200		64	IC	201
	67	IC	238	119	46	B	327	168	46	B	419		23	BLR	1024
	46	B	757		64	IC	995		64	IC	1004	199	46	B	200
81	24	BLR	115		23	BLR	1171		23	BLR	1186		64	IC	517
	66	IC	943	121	46	B	341	169	46	B	429		23	BLR	1009
82	24	BLR	99		64	IC	917		23	CrLJ	93	200	46	B	239
	66	IC	328		23	BLR	1083		65	IC	445		64	IC	225
	23	CrLJ	264	122	46	B	312		23	BLR	1199		23	BLR	1046
83	24	BLR	305		64	IC	923	170	46	B	463	201	24	BLR	267
	67	IC	356		23	BLR	1094		64	IC	570		67	IC	151
	46	B	827	124	46	B	302		23	BLR	1238		46	B	764
84	24	BLR	449		64	IC	913	171	46	B	396	202	24	BLR	140
	47	B	191		23	BLR	1079		64	IC	1000		46	B	655
	82	IC	628	126	46	B	289		23	BLR	1183		67	IC	129
94	24	BLR	261		68	IC	225	172	24	BLR	313	203	24	BLR	149
	67	IC	176		23	BLR	1016		67	IC	364		69	IC	29
95	24	BLR	269	127	46	B	348		46	B	840	205	24	BLR	308
	67	IC	153		64	IC	1004	173	46	B	455		67	IC	360
	46	B	761		23	BLR	1176		65	IC	216		46	B	833
96	24	BLR	249	130	46	B	1		23	BLR	1320	207	24	BLR	744
	67	IC	209		23	BLR	597	176	46	B	424		47	B	11
	46	B	726		63	IC	910		64	IC	975		69	IC	169
97	24	BLR	105	134	46	B	17		23	BLR	1195	209	24	BLR	507
	46	B	657		23	BLR	587	177 (1)	46	B	120		67	IC	754
	66	IC	323		63	IC	1001		23	BLR	839		47	B	28
	23	CrLJ	259	137	46	B	28		22	CrLJ	620	210	24	BLR	738
99	46	B	317		64	IC	115		63	IC	156		70	IC	310
	23	CrLJ	23		23	BLR	777	177 (2)	46	B	32	211	24	BLR	720
	64	IC	503	138	46	B	61		76	IC	155		46	B	1009
	23	BLR	987		64	IC	40	179	46	B	162		70	IC	912
102	46	B	292		23	BLR	884		64	IC	397	213	24	BLR	749
	64	IC	214	144	46	B	37		23	BLR	858		47	B	44
	23	BLR	1040		23	BLR	803	183	46	B	24		69	IC	175
105	46	B	307		62	IC	954		23	BLR	606	215	24	BLR	734
	64	IC	899	146	46	B	48		63	IC	923		46	B	1017
	23	BLR	1076		64	IC	117	184	46	B	44		70	IC	964
107	46	B	85		23	BLR	796		64	IC	114	216	24	BLR	768
	64	IC	364	147	77	IC	515		23	BLR	793		68	IC	490
	23	BLR	873	149 (2)	46	B	56	186	46	B	195	217	70	IC	423
108	46	B	97		23	BLR	802		64	IC	492	218	24	BLR	726
	23	BLR	820		62	IC	952		23	BLR	1000		70	IC	955
	22	CrLJ	636	150	46	B	213	188	46	B	108	220	24	BLR	370
	63	IC	332		64	IC	205		68	IC	510		67	IC	840
109	46	B	134		23	BLR	1033		23	BLR	903		46	B	964
	64	IC	555	152	46	B	229	189	46	B	11	221	24	BLR	102
	23	BLR	972		64	IC	919		64	IC	4		66	IC	331
110	46	B	345		23	BLR	1086		23	BLR	583		23	CrLJ	267
	64	IC	208	156 (1)	77	IC	521	191	46	B	58	222	24	BLR	95
	23	BLR	1037	156 (2)	16	B	218		23	BLR	836		46	B	632
111	46	B	335		64	IC	485		22	CrLJ	624		66	IC	929
	64	IC	202		23	BLR	979		63	IC	160	223	24	BLR	158
	23	BLR	1028	157	46	B	176	192	46	B	52	FB	67	IC	134
113 (1)	46	B	150		64	IC	390		23	BLR	799		46	B	776
	68	IC	217		23	BLR	866		62	IC	942	233	70	IC	417
	23	BLR	911	158	46	B	205	193	46	B	171	234	24	BLR	319
113 (2)	46	B	125		64	IC	177		23	BLR	847		67	IC	308
	64	IC	55		23	BLR	1018		63	IC	39		46	B	903
	23	BLR	883	160	46	B	211	194	24	BLR	284	235	24	BLR	358
14	46	B	79		64	IC	160		67	IC	169		46	B	819
	64	IC	156		23	BLR	1023		46	B	719		68	IC	335
	23	BLR	745	161	46	B	366	195	46	B	243	237	4	BL	410
16	46	B	89		64	IC	103		69	IC	55		7	IC	847

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A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
	46	B	848	290	23	CrLJ	45	361	24	BLR	1049		67	IC	433
238	46	B	467		46	B	441		47	B	117	405	24	BLR	779
	24	BLR	97		23	BLR	1203		76	IC	78		68	IC	518
	66	IC	940	292	46	B	435	365	46	B	272	407	24	BLR	437
239 (1)	24	BLR	380		64	IC	568		23	BLR	1288		67	IC	413
	66	IC	994		23	BLR	1236		85	IC	427		46	B	910
	23	CrLJ	338	293	16	B	390	368	24	BLR	484	408	24	B L	812
239 (2)	24	BLR	748		64	IC	564		47	B	31		68	IC	481
	47	B	35		23	BLR	1209		25	Cr LJ	315		47	B	263
	69	IC	172	295	70	IC	860		76	IC	1035	409	24	BLR	805
240	24	BLR	707	296	80	IC	189	370	46	B	520		68	IC	414
	69	IC	95	299	46	B	589		23	BLR	1279		23	CrLJ	574
	47	B	71		64	IC	703		87	IC	269	410	47	B	95
	23	CrLJ	656		23	BLR	1253	376	46	B	142		24	BLR	917
241	24	BLR	364	300	46	B	400	F. B.	64	IC	486		68	IC	746
	46	B	895		64	IC	614		23	BLR	995	413	46	B	925
	69	IC	161		23	BLR	1272	377 (1)	46	B	130		24	BLR	428
243	24	BLR	373	303	46	B	489		64	I C	386		67	IC	833
	66	IC	764		66	IC	726		23	BLR	908	415	46	B	843
	46	B	920		23	BLR	1144	377 (2)	46	B	128		24	BLR	406
245	24	BLR	445	319	46	B	535		64	I C	337		67	IC	844
	67	IC	419		64	IC	972		23	BLR	909	416	47	B	18
	46	B	952		23	BLR	1191	378	46	B	115		24	BLR	416
247	46	B	663	321	46	B	541		64	IC	418		67	IC	852
FB	24	BLR	178		24	BLR	69		23	BLR	1004	420	47	B	48
	69	IC	19		77	IC	17	380 (1)	46	B	128		24	BLR	789
254	24	BLR	471	329	24	BLR	323		64	IC	357		77	IC	219
	47	B	218		46	B	966		23	BLR	881	424	24	BLR	911
	82	IC	641		67	IC	322	380 (2)	46	B	226		68	IC	741
256 (1)	24	BLR	787	331	46	B	560		64	IC	490	426	47	B	76
	68	IC	534		24	BLR	88		23	BLR	981		24	BLR	928
257 (2)	46	B	470		67	IC	253	381	24	BLR	400		69	IC	84
	24	BLR	131	334	24	BLR	741		69	IC	94		23	Cr LJ	644
	68	IC	277		69	IC	165		47	B	15	433	24	BLR	847
261	24	BLR	386	335	24	BLR	845		23	Cr LJ	654		75	IC	193
	66	IC	821		75	IC	128	382	24	BLR	414	436	46	B	854
	46	B	973	336 (1)	70	IC	768		67	IC	850		44	BLR	361
	23	CrLJ	325	336 (2)	70	IC	728		46	B	908		67	IC	913
267	46	B	184	337 (2)	46	B	694	383	24	BLR	925	437	24	BLR	351
	23	BLR	769		64	IC	644		69	I C	80		67	IC	936
	63	IC	478		23	BLR	1259		47	B	106	438	24	BLR	902
271	24	BLR	771	340	46	B	702	384	24	B L R	807		75	IC	617
	68	IC	349		64	IC	648		68	I C	619	440	44	BLR	502
	46	B	1031		23	BLR	1263		47	B	89		68	IC	1005
273	46	B	546	341	70	IC	754		23	Cr L J	587	443	46	B	772
	64	IC	692	342	24	BLR	709	385 (1)	24	B L R	924		65	IC	160
	23	BLR	1251		69	IC	102		47	B	104		23	BLR	1326
274	24	BLR	402	345 (1)	70	IC	762		69	I C	207	444	24	BLR	853
	67	IC	842	345 (2)	46	B	707	385 (2)	24	B L R	378		47	B	250
	46	B	811		64	IC	610		66	I C	768		75	IC	221
276	46	B	431		23	BLR	1267		46	B	939	449 (1)	47	B	92
	64	IC	580	346	70	IC	767	386	24	BLR	476		24	BLR	909
	23	BLR	1228	347	24	BLR	836		67	IC	426		75	IC	283
277	46	B	409		47	B	37	387	24	BLR	729	449 (2)	46	B	887
	64	IC	612		77	IC	117		70	IC	959		65	IC	212
	23	BLR	1268	350	24	BLR	762	390	24	BLR	872		23	BLR	1316
278	46	B	415		68	IC	487		47	B	275	451	24	BLR	1304
	64	IC	576		46	B	993		75	IC	61		76	IC	145
	23	BLR	1225	352	24	BLR	794	392	24	BLR	753	453	47	B	102
280	70	IC	859		68	IC	504		70	IC	268		24	BLR	810
281	46	B	368		47	B	65		47	B	231		68	IC	416
	64	IC	966	354	24	BLR	826	397	24	BLR	489		23	Cr LJ	576
	23	BLR	1135		46	B	1022		67	IC	654	454	24	BLR	1318
284	24	BLR	885		84	IC	508		46	B	946		81	IC	296
	24	CrLJ	923	356	24	BLR	713	399	24	BLR	782	455	24	BLR	817
	75	IC	299		46	B	1000		68	IC	521		68	IC	33
289	46	B	384		70	IC	906	402	24	BLR	831		23	Cr LJ	497
	64	IC	928	359	24	BLR	798		47	B	4		47	B	270
	23	BLR	1098		68	IC	506		76	IC	71				
290	64	IC	669		47	B	56	404	24	BLR	466				

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THE

ALL INDIA REPORTER

1922

BOMBAY HIGH COURT

A. I. R. 1922 Bombay 1.

MACLEOD, C. J. AND SHAH, J.

Ibrahim Valad Gulam Husen Mulnaji—Plaintiff-Appellant

v.

Mobiddin Balku Moduk and others—Defendants-Respondents.

S. A. No. 889 of 1920, decided on 5th December, 1921, from the decision of Dist. J., Ratnagiri, in A. No. 293 of 1919.

T. P. Act, S. 72—Adverse possession—Purchase by mortgagee from a co-mortgagor—Redemption—Other co-mortgagor knowing of the purchase—Time runs against him and right to redeem is extinguished after 12 years.

If a mortgagee gets in the equity of redemption from one of two co-mortgagors and claims to be in possession as owner to the knowledge of the other co-mortgagor then it may be said that the right of the co-mortgagor to redeem his share will be extinguished after 12 years. If the co-mortgagor is not acquainted with the purchase of the equity of redemption from the other co-mortgagor time does not run against him in favour of the mortgagee who has purchased the equity of redemption. [P. 1, C. 2.]

Coyajee and *G. B. Chitale*—for Appellant.

G. S. Rao and *B. V. Desai*—for Respondent No. 1.

Judgment.—The suit property belonged to three persons, Gana, Tana and Yesa. Whether they were joint owners or tenants-in-common does not appear. On 6th December, 1884, Tana mortgaged the property to Vithal Ganesh by Ex. 54, and on the 15th December, 1884 all the three created a further charge in favour of Vithal Ex. 30. It is mentioned that all three agreed to be bound by the previous mortgage of Tana.

On the 26th August, 1889, Chintu purchased at an auction sale in execution of a money-decree against Gana and others, the equity of redemption of Gana in the suit property. In 1891 the sale certificate Ex. 57 was issued, on the 27th September, 1895, Vithal, the original mortgagee and his son Govind sold their interest as mortgagee to the first defendant, on the 7th January, 1905 document was passed by Vithal, the son of Gana, and by Tana to the 1st defendant.

It purported to be a mortgage-deed in substitution of Exs. 54 and 30 and so creating a fresh mortgage for the previous amounts plus the amount admitted to have been spent by the mortgagee on improvements and further fresh cash advanced on the 13th February 1906; the 1st defendant obtained a conveyance out and out from Vithal and Tana.

On the 20th October, 1895 Chintu who purchased the interest of Gana and his right to redeem these properties, sold his right, title and interest to Vithal and his son Govind who had only recently on the 27th September sold the mortgagees' rights to the 1st defendant. On the 7th November, 1908, the plaintiff purchased from Vithal's son Govind and another their interest in the property. Defendant now resists the claim of the plaintiff to redeem on the ground that by the document of 7th January, 1905, the previous mortgages were extinguished and he so held adversely to any one who claimed to have any right to redeem these mortgages.

The question is whether the plaintiff, after all these various transactions, has still retained a right to redeem the mortgaged property. If a mortgagee gets in the equity of redemption from one of two co-mortgagors and claims to be in possession as owner to the knowledge of the other co-mortgagor then it may be said that the right of the co-mortgagor to redeem his share will be extinguished after 12 years. We have not been referred to any authority for the proposition that if a co-mortgagor is not acquainted with the purchase of the equity of redemption from the other co-mortgagor, still, time is running against him in favour of the mortgagee who has purchased.

The first defendant acquired nothing by the deed, dated 7th January, 1905 from Gana's son Vithal, since Gana had no interest left in the property. If he is considered to have taken a fresh mortgage from Tana when on the 13th February, 1908, he obtained a conveyance out and out from Tana ; it might be said that as far as that mortgage was concerned, the equity of redemption had gone, still the holder of Gana's equity of redemption would be entitled to fight out the question of redeeming Gana's share from the mortgagee, who, he says, bought the equity of redemption from Gana's co-mortgagor.

In any event limitation would not run until the 13th February, 1906 in which case the suit would be in time. But as far as we can see Vithal and his son Govind were the owners of Gana's rights in January 1905 and it could not be shown that there was anything, which prevented them from giving out these rights against the 1st defendant. The plaintiff who purchased these rights on the 7th November, 1908, is therefore able to sue.

Although the transactions relating to the suit property were somewhat complicated (and we are much indebted to Mr. Coyajee for his lucid exposition of them) we think, they were made very much more complicated by the lower Court's not taking in clearer view of the issues involved. No doubt, in the trial Court the real issues were obscured by the various other issues, which had no connection with the issues of limitation.

We think the decree dismissing the suit with costs was wrong and the plaintiff should be held to be entitled to redeem one-half of the suit property from the first defendant on payment of what will be found due on half the mortgage. We have heard nothing about the third mortgagor Yesa, or his descendants, who may be entitled to come in, and ask for redemption with regard to one-third of the property.

The plaintiff must get his costs in this suit, and in the lower appellate Court and will have to pay costs in the trial Court. There will be an inquiry as to the amount payable by the plaintiff in order to redeem his share when that is ascertained a preliminary decree for redemption will be passed.

Cross-objections are allowed with costs.

A. I. R. 1922 Bombay 2.

PRATT AND KANGA, JJ.

Raghunath Vaman Matapurkar and others —Plaintiffs Appellants

v.

Kondiba Babaji Mokashi and others—Defendants-Respondents.

L. P. A. No. 9 of 1921 decided on 3rd February, 1922 from the order passed by Macleod, C. J.

Adverse possession--Symbolical possession is effective only in cases where it is recognised by the Code—Recognises

Symbolical possession is effective only in the cases in which the Code recognises symbolical possession (36 Bom. 373) followed. Where certain persons were defendants to a suit for partition and against whom the relief of ejectment was asked for but not granted, they are in substance not parties to the suit and delivery of possession as against him is not delivery of symbolical possession and the ruling in 20 Bom. L. R. 502 would not therefore apply to the case. [P. 3, C. 1,2.]

A. G. Desai—for Appellants.

S. C. Joshi for *Nijsure*—for Respondent No. 2.

Judgment:—This is a suit by the plaintiffs to recover possession of property of which they claim title, from the defendants, alleging prior dispossession. Both the lower Courts have found the plaintiff's title to the property in suit proved but his suit has been dismissed on the ground that he has not shown, as he should show, under Article 142 of the Limitation Act that he was in possession within 12 years of the suit.

Now the various proofs which the plaintiffs gave of possession are all issues of fact disposed of by the judgments of the lower Courts with the exception of one that survives in this appeal. That is the plaintiffs' claim to have obtained possession under execution proceedings which followed on a partition suit filed by their brother in 1907. In that suit the two plaintiffs were the 1st and 2nd defendants and a decree for partition was made on the 11th October, 1907. The plaintiffs claim that they got possession of the property in execution proceedings under that decree and that the defendants were bound because they were made parties in that suit.

Now the suit was a partition suit filed against the two plaintiffs by their brother and the defendants in this suit were impleaded on the ground that they were in possession and colluding to defeat the plaintiff. The suit was therefore in effect a suit for partition as against the present plaintiffs and a suit for ejectment as against the

present defendants. The decree, however, that was made gave the relief of partition only as between the two present plaintiffs and their elder brother but no relief was given as against the present defendants.

The execution proceedings were referred to the Collector on the 17th December, 1910, and the Surveyor who was the ministerial officer of the Collector to make the partition, reported that he was unable to make the partition because the present defendants claimed that they were in possession and that the land was theirs.

On this report, the Subordinate Judge gave instructions to the Collector to the effect that the obstruction of the defendants would be of no avail. The matter was then again referred to the Surveyor and before the Surveyor on the 30th May, 1911, the two plaintiffs signed an acknowledgment that they had received possession of the land in suit.

Now the acknowledgment of the 30th May, 1911, does not show that the defendants were dispossessed of the land in suit or that physical possession was given. Mr. Desai, however, contends that the transaction of that date amounted to delivery of a symbolical possession and that in the recent case of *Radha Krishna* v. *Ram Bahadur* (1), the Privy Council have held that symbolical possession is sufficient to interrupt adverse possession of a person who was a party to the proceeding in which possession was ordered and given.

But this judgment was given in a case where the land was in the possession of cultivating tenants and proceeds on the basis that the case was one in which symbolical possession could be given. It in no way affects the Full Bench ruling of this Court in *Mahadev Sakharam Parkar* v. *Janu Ramji Batle* (2), that symbolical possession is effective only in the cases in which the Code recognises symbolical possession.

Here if symbolical possession was given, it could only be on the assumption that defendants who were in possession were not bound by the decree (Order XXI, Rule 36). If they were bound by the decree then the so-called symbolical possession was ineffective.

Further it is not a case which can be brought within the Privy Council ruling because though they were parties to the partition suit yet in substance the suit against them was only for ejectment and no order was passed or no decree given against them for ejectment.

On these grounds, therefore, (1) the possession given was not symbolical possession as justified by the Code and (2) they were not in substance parties to the suit, the case is outside the scope of the Privy Council ruling.

We accordingly confirm the decree of the lower Court and dismiss this appeal with costs. *Appeal dismissed.*

(1) (1918) 20 Bom. L. R. 502 (P. C.).
(2) (1912) 36 Bom. 373=14 I. C. 447=14 Bom. L. R. 115 (F.B.).

A. I. R. 1922 Bombay 3.

MACLEOD, C. J. AND SHAH, J.

Ratan Lal Bhola Ram and others—Defendants-Appellants.

v.

Gulam Husen Abdul Ali—Plaintiff-Respondent.

S. A. No. 286 of 1921, decided on 27th September, 1921, from the decision of Dist. J., Khandesh in A. No. 286 of 1921.

Easements Act, S. 15—Easement acquired before burning of a house—Rebuilding—Right to the same access of light and air is not lost—House burnt during the process of acquiring easement — Immediate re-building — Enjoyment will not be deemed to be interrupted—Delay in re-building may be evidence against the intention to resume user.

If the plaintiff had already acquired an easement of light and air for certain windows in the building before it was burnt down and had rebuilt his house with windows corresponding with the old windows, he would be entitled to the same access of light and air as that enjoyed by the old windows.

If the owner of the building, who in the course of acquiring a right of easement by prescription is so unfortunate as to have his house burnt down, begins immediately to re-build his house and places the windows exactly in the same position as the old ones, it may be said that he has been enjoying the access and use of light and air continuously. If however there is any delay in re-building then that might be evidence of an intention not to resume the user.

[P. 5, C. 1.]

P. V. Kane—for Appellants.

M. V. Bhat—for Respondent.

Macleod, C. J.:—The plaintiff sued to restrain the defendants from blocking up certain windows of his house.

The defendants replied that the plaintiff had not acquired a complete prescriptive right to the light and air of the windows mentioned in the plaint, so that they were entitled to block up these windows.

The trial Court granted an injunction with regard to the windows of the western wall in the second storey of the plaintiff's house. An appeal from this decision was dismissed.

In the lower appellate Court the only question argued was whether the windows on the second storey of the plaintiff's house were built more than twenty years before August, 1918, when the plaint was filed. Apparently the question whether the enjoyment of light and air had been continuous since the building of the second storey was not argued.

In second appeal the appellants contend that the plaintiff had not peaceable enjoyment of the light and air which he claimed as an easement for twenty years, on the ground that the building was burnt down in 1905 and rebuilt, so that during the period of rebuilding there were no windows with regard to which the use of light and air could be enjoyed. There does not appear to be any authority, strange to say, on this question.

Admittedly, if the plaintiff had already acquired an easement of light and air for certain windows in the building before it was burnt down in 1905, and had rebuilt his house with windows corresponding with the old windows, he would be entitled to the same access of light and air as that enjoyed by the old windows. But in 1905 the plaintiff was in the process of acquiring an easement of light and air for these windows, and since peaceable enjoyment for twenty years is necessary, it is contended that during the period of re-building he could not have enjoyed the access or use of light and air to these windows.

Section 15 of the Indian Easements Act says that the user must be peaceably enjoyed without interruption. But 'interruption' is defined in Explanation 2 and it is conceded by the appellants that the interruption in the user, owing to the building having been burnt down and having to be re-built, was not an interruption within the meaning of the explanation, because the interruption to the user was not owing to the act of some person other than the claimant.

The appellants' argument seems to be that the period of re-building ought to have been deducted from the period of user. But I do not think that this is correct. Either the period of re-building must be included in the twenty years, or the interruption in the user would stop time running in favour of the owner of the building, so that he would have to start afresh acquiring a right by prescription to an easement of light and air for the windows of the new house.

Therefore this is a case, where, owing to an accident, the person who was endeavouring to acquire a right by prescription to an easement of light and air for the windows of his house was prevented during a short period from enjoying any light and air as there were no windows through which he could enjoy them.

The case of *Andrews* v. *Waite* (1) may help us to decide this question, although the question there was whether the right to the access of light to a building which had been enjoyed through one window was preserved upon an alteration of the building. It was decided that the answer to that question depended on the identity of light, not on the identity of aperture. The Judge after setting out the facts said:

"Has there been such an alteration of his (the plaintiff's) premises, both in 1888 and again still more conspicuously in 1895, as to prevent his acquisition of any right to light over the defendant's premises at all. That, I think, must depend upon the proper construction to be put upon Section 3 of the Prescription Act, which refers to acquisition of rights of light, taken in connection with the decisions of the Courts in respect of the matter. It is said that, except with regard to the term necessary for the acquisition of the right, the Prescription Act did not alter the law as it existed at the time the Act was passed. I think that is probably true, but if so the Act shows that the law at that time was, so far as the Act purports to state anything in connection with it."

Then this is the important passage :—

"I do not think that any distinction can be drawn between what, in the way of alteration, involves the loss of the right to light when once indefeasibly acquired, and what is sufficient to prevent the acquisition of the right during the twenty years."

Therefore paraphrasing these words, non-user during the twenty years must be such non-user as would involve the loss of the right to light if it had been indefeasibly acquired. I may now refer to Goddard's Law of Easements (7th Edn.) at page 269 :—

"Mere non-user will not, in every case, prevent acquisition of an easement; but, to have that effect, it must be coupled with some act indicative of an intention to abandon the claim, or it must be of such long continuance, and so constant, as to indicate an intention not to resume the user. Non-user, however, which would not prevent acquisition of an easement at common law, may often be sufficient to do so under the Prescription Act, which requires *actual* enjoyment for the full period."

(1) (1907) 2 Ch. 500=76 L. J. Ch. 676=97 L. T. 428.

I do not think that the last sentence in any way weakens the effect of the last passage of the judgment in *Andrews* v. *Waite* (1) to which I have referred, because it is not necessary that there should be actual enjoyment of the right every moment of each twenty-four hours during the twenty years. I do not suppose that if the owner of a building, who was seeking to acquire a right by prescription to an easement of light and air for his windows, went away for six months, and during that time the shutters of the windows of his house were closed, such non-user would stop time from running in his favour.

It seems to me, therefore, that the question must depend very much on the facts of each case, and that if the owner of a building who, in the course of acquiring a right of easement by prescription, is so unfortunate as to have his house burnt down, begins immediately to rebuild his house and places the windows exactly in the same position as the old ones, it may be said that he has been enjoying the access and use of light and air continuously, and he will be entitled to protection after twenty years from the first building. If, however, there is any delay in re-building, then that might be evidence of an intention not to resume the user.

The appeal, therefore, must be dismissed with costs.

Shah, J.:—I agree.

Appeal dismissed.

A.I.R. 1922 Bombay 5.

MACLEOD, C. J. AND SHAH, J.

Tungabai Gopal Desai—Plaintiff-Appellant

v.

Krishnaji Ramchandra Deshpande—Defendant-Respondent.

Second Appeal No. 1105 of 1918 decided on 7th December, 1921, from the decree of the Dist. J., Dharwar in A. No. 120 of 1917.

Vatan—Palkhi Inam to Vatandars *by Mahomedan King of Bijapore is a grant of property in soil and is an appanage of the* Vatan—*Grant.*

The village granted to the Deshpande *Vatandars* as *Palkhi Inam* by the Mahomedan King was to pay their *Palkhi* expenses and therefore it was an appanage of the vatan. It was not merely a grant of the Royal share of Revenue,

In this presidency Inams and other similar grants are being treated as implying a grant of the royal share of the revenue and not necessarily of the soil, unless words suitable to indicate a grant of the soil are used in the document evidencing the grant.

[P. 6, C. 1; P. 7, C. 2.]

K. H. Kelkar—for Appellant.

Coyajee and *H. B. Gumaste*—for Respondent No. 1.

Macleod, C. J.:—The plaintiff sued to recover from defendants Nos. 1 to 5 and 9 and 10 by equitable partition her one-third share in the properties mentioned in Schedules A, B and D of the plaint or one-third share in the lands in Schedule C, even if the property in A was Deshpandegiri *Vatan*, and for mesne profits. The properties in A, B and D originally belonged to one Gurnath Dattatraya Deshpande who died leaving three sons, Dattu, Shripad and Bhimappa. Shripad was the last owner as survivor and he died in January 1903 without issue, but leaving three sisters who filed three suits for partition. It was further urged by the plaintiff that though the property in Schedule C was *Vatan*, the occupancy rights were not *Vatan* as they existed before the grant of the *Inam*. The defence was that the lands were *Vatan* and so the plaintiff was not entitled to succeed. One decree was passed in the three suits.

The trial Court held that the occupancy rights in the lands in Schedule C and D with certain exceptions were not *Vatan*. The plaintiff was also held entitled to certain sites in Schedule A. The lower appellate Court held that the plaintiff was not the owner of the occupancy rights in the lands mentioned in Schedules C and D with the exceptions mentioned in the decree. The plaintiff has appealed and the only question argued in the appeal was whether the land in the village of Gudgudi were ordinary *Inam* or *Vatan*.

The case has been unduly complicated by the view taken by the trial Court that the rights of the plaintiff's ancestors in the village were partly *Inam* partly *Vatan* that the original grant was a grant of the royal share of the revenue, and any occupancy rights they possessed were acquired afterwards, so that they could not be considered as subject to the rules of succession to *Vatan* property.

The learned appellate Judge seemed to think that this was a possible inference, but came to the conclusion that the grant included extensive proprietary rights and was a grant of the soil in that sense subject to rights already existing. Now if we concede that whatever rights the plaintiff's family now possess in the

village arose from the original grant, it follows that those rights are either *Inam* or *Vatan* according to the purpose for which that grant was made.

If, however, only the royal share of the revenue was granted for *Vatan* services it would not be impossible for the *Vatan* family to have acquired afterwards proprietary rights in the village lands which would be their personal property and would descend according to the rules of Hindu law. But it has not been suggested in this case that the occupancy rights in the village have been acquired apart from the original grant or the *Sanad* issued in 1901.

Exhibit 112 contains a copy of the original grant, from which it appears that the village of Gudgudi was given as *Palkhi Inam* to the plaintiff's ancestors who were admittedly Deshpande *Vatandars*.

The village was described as having fallen fallow, the revenue being 150 Hons. 600 Hons. were to be paid as premium while the *Vasul* was to be paid at stated times. Judged by the rules laid down by the decisions of the British Courts, it might be said that this was only a grant of the revenue, but I quite agree with the learned appellate Judge that those rules have been laid down without considering from the lessons of history what were the actual conditions when grants going back 250 years, as this one does, were made.

'To quote from the judgment, they assume a stabilised condition of the village granted where all cultivable land is occupied by cultivators who are entitled to remain on the soil so long as they pay a definite amount out of the produce or a definite share of the produce to Government. In such a case nothing would be left to Government to give away except what it received itself as revenue. But we cannot assume that those conditions existed in the seventeenth century.

The grantee may or may not have recognized existing rights but what those rights may have been it is impossible for us to say. That occupancy rights were recognised by Governments previous to British Rule may be admitted, but I very much doubt whether those Governments in making grants considered that such grants were anything more than grants of the rights which existed in Government at the time they were made.

However that may be, it is clear that the village was granted to the *Vatandars* to pay their *Palkhi* expenses and was therefore an appanage of the *Vatan*. Under the Gordon Settlement which dealt with service *Inams*, the village was classified as Deshpande *Vatan* and the *Sanad*, which was eventually issued in 1901, after reciting that certain lands and cash allowances were entered in the Government accounts for the years 1863-64 as held in service tenure, declared that the said lands and cash allowances should be continued hereditarily by the British Government on certain conditions. No distinction was made between the right to levy the assessment and the right to occupy the land so that it cannot be said that only the former was settled to be *Vatan* by the *Sanad*.

A very similar question arose in *Amrit* v. *Hari* (1). The original grant was made in 1734 by a Maratha Ruler for maintenance in return for service. In 1884 the grantee accepted a settlement on the lines of the Gordon Settlement and the *Sanad* issued was in the same terms as the *Sanad* in this case. Shah, J. said (p. 249): "In the absence of any clear proof that the occupancy right on the Survey Number in suit was vested in the plaintiff's ancestor independently of the grant and that the land in suit was outside the lands dealt with in the Settlement of 1884, I think it must be held to be *Vatan* property like the village itself. Thus where the whole village is mentioned in a *Sanad* evidencing a settlement under Section 15 of the Hereditary Offices Act, it is for the party, alleging that a particular Survey Number of that village is outside the scope of the settlement, to prove it."

Even in the case of *Inams*, the decisions of this Court, that in the absence of evidence as to the terms of an *Inam* grant made by a Native Ruler before British Rule, there is a presumption of law that the grant was only of the royal revenue from the land and not of the soil, may require to be re-considered since the decision of the Privy Council in *Suryanarayana* v. *Patanna* (2).

Their Lordships said at p. 218: "In their Lordships' opinion there is no such presumption of law. But a grant of a village by or on behalf of the Crown under the British Rule is in law to be presumed to be subject to such rights of

(1) (1920) 44 Bom. 237=56 I.C. 411=22 Bom. L. R. 275.

(2) A. I. R. 1918 P. C. 169=41 Mad. 1012=45 I. A. 209 (P.C.)

occupancy, if any, as the cultivators at the time of the grant may have held."

This judgment was referred to with approval in *Upadrashta Venkata* v. *Divi Seetharamudu* (3).

I think the decision of the lower Court was right and all the appeals must be dismissed with costs.

Shah, J.:—The principal point argued in this appeal is whether the lands in the village of Gudgudi held by the Deshpandes is an ordinary *Inam* or part of their *Vatan* property. If it be an ordinary *Inam*, whatever the nature of the grant, whether the grant be of the soil or of the royal share of the revenue, it would go to the heirs of the last holder according to the Hindu law. If it be a part of the *Vatan* property the females would be postponed to the male members of the family under Bombay Act V of 1886.

It is urged on behalf of the original plaintiff that the original grant was made in favour of the defendants' ancestors, who were the Deshpandes, by the then King of Bijapur about the end of the seventeenth century, and that it was given in Inam for *Palkhi* allowance and not as part of the remuneration of the office which the Deshpandes held.

On the other hand it is an admitted fact that the whole of this Deshpandegiri *Vatan* was settled on the lines of the Gordon Settlement and the usual Sanad was issued in 1901 in which the lands in question are referred to as part of the Deshpandegiri *Vatan*.

Both the lower Courts have found that it is part of the *Vatan* property and not an ordinary *Inam*. This finding is amply supported by the terms of the Sanad and by the fact that at least under the British Rule the grant has been treated by the parties and the Government as part of the *Vatan* property and as a part of the remuneration for services.

It is no doubt possible that a *Palkhi* allowance, which was made in favour of the original grantee by the Bijapur authorities, might not necessarily be part of the remuneration of the office held by the grantee. But it is also possible that it might be an appanage of the office and as such would go with the office. The terms of the original grant so far as they are available do not throw any light on the point and the way in which the parties and the Government had treated it is indicated by the *Sanad*. This contention of the plaintiff must be disallowed.

It is further urged that even in the case of *Vatans* distinction must be made between the occupancy rights and the *Inam* rights which would be limited to the royal share of the revenue. In view of the observations relating to *Vatan* property in *Amrit* v. *Hari* (1) Mr. Kelkar did not press this point seriously. It is clear on the terms of the *Sanad* that the grant must be taken to be a grant of the soil and not merely of the royal share of the revenue as was held in *Amrit* v. *Hari* (1) on the terms of a similar Sanad.

It is true that the terms of the original grant by the Bijapur Kings in this case do not clearly indicate a grant of the soil, but merely a grant of the royal share of the revenue. The usual expression (jal, taru, etc.) indicating a grant of the soil is not to be found: and if the matter depended entirely upon the terms of that grant there would be some difficulty in holding that it was anything more than a grant of the royal share of the revenue. So far this case differs from the case of *Amrit* v. *Hari* (1).

But in determining the nature of the *Vatan Inam* I think that regard should be had to the terms of the Sanad and the nature of the settlement under which the *Sanad* was issued and on the point this case is similar to the case of *Amrit* v. *Hari* (1). I do not think that any real basis is made out for making such a distinction in the case of this *Vatan*, and for holding that it is the royal share of the revenue and not the land or the occupancy right therein that forms part of the *vatan*.

The result is that the appeal must be dismissed with costs. The other companion appeals also will be dismissed with costs.

I desire to make it clear that in taking this view as to the nature of the *Vatan* in this case, I do not mean to doubt in any sense the correctness of the view accepted in this Presidency as to the Inams and other similar grants being treated as implying a grant of the royal share of the revenue and not necessarily of the soil unless words suitable to indicate a grant of the soil are used in the document evidencing the grant.

I have nothing to add to what I have stated in the last but one paragraph of my judgment in *Amrit* v. *Hari* (1) as regards the effect of certain observation in *Suryanarayana* v. *Patanna* (2) on the view so far accepted in this Presidency

(3) A. I. R. 1919 P. C. 111=43 Mad. 166=46 I. A. 123 (P. C.).

beyond this that the *ratio decidendi* in the recent case of *Secretary of State for India in Council* v. *Srinivasa Chariar* (4) appears to me to support that view.

Appeal dismissed.

(4) A I.R. 1921 P.C. 1=44 Mad. 421=48 I.A. 56 (P.C.).

A. I. R. 1922 Bombay 8.

MACLEOD, C. J. AND SHAH, J.

Visnu Vinayak Vaze—Plaintiff-Appellant.

v.

Secretary of State for India—Defendant-Respondent.

First Appeal No. 79 of 1921, decided on 6th December, 1921, from the decision of District Judge of Ahamadnagar in Suit No. 2 of 1919.

Bombay Irrigation Act (VII of 1879), Ss. 3, 31, 34 and 35—Suit for compensation for loss for non-supply of water—Civil Court has no jurisdiction to try.

Under Section 36, the decision of the Collector either under Section 34 or 35 as to the amount of the compensation to be awarded, shall be final unless there is an appeal to a higher authority in which case the decision of the higher authority shall be conclusive. These words show that it was intended that the jurisdiction of the Civil Courts should be ousted, so that the holder of land should not be entitled to bring a suit for compensation for loss alleged to have arisen out of interruption to the supply of water to his lands.

[P. 8, Cs. 1, 2]

P. V. Nijsure—for Appellant.

S. S. Patkar—for Respondent.

Macleod, C. J.:—The plaintiff filed this suit to recover damages for the alleged wrongful failure of the officers of Government in-charge of the water-supply to give a sufficient supply of water to his Survey Numbers, during the years 1916 to 1918. Under Section 35 of the Bombay Irrigation Act, VII of 1879, the holder of land may apply to Collector for compensation for any loss arising out of such interruption provided that such interruption does not come under Section 31, Clause (d).

This case cannot come under Section 31 (d) and, if it did, compensation could not be awarded; but the person suffering loss might be entitled to such remission of water rate payable by him as might be authorised by the Governor in Council. If there is loss, under Section 35 the holder of land may present a petition for compensation to the Collector, and the Collector after consulting the canal officer, shall award to the petitioner reasonable compensation for such loss.

Under Section 36 the decision of the Collector either under Section 34 or 35 as to the amount of the compensation to be awarded shall be final, unless there is an appeal to a higher authority, in which case the decision of the higher authority shall be conclusive. These words, in my opinion, show that it was intended that the jurisdiction of the Civil Courts should be ousted, so that the holder of land should not be entitled to bring a suit, similar to the present one, for compensation for loss alleged to have arisen out of interruption to the supply of water to his lands.

It seems to me that this was the obvious intention of the Legislature. Otherwise numerous suits might be filed by cultivators dissatisfied with the operations of the irrigation officers, though questions which arise between cultivators and irrigation officers, are clearly questions which in the first instance must be dealt with by the officers in-charge of irrigation operations on the spot, and then in appeal by the revenue officers. That being, in my opinion, the intention of the Legislature I think it has been given effect to by the words used.

Therefore I think that the jurisdiction of the Courts is ousted and the decision of the Court below was right. The appeal must be dismissed with costs.

Shah, J.:—I think it is clear that the compensation which the plaintiff claims, if it falls under Section 31, proviso Clause (d), cannot be allowed at all except the amount, if any, claimed by way of remission of water rates under the last paragraph of that proviso. But his claim is not for such remission, but for compensation. He is not entitled to such compensation so far as it falls under clause (*b*) of the proviso. But if it does not fall under clause (*b*), of the proviso to Section 31, it is clear that his claim is one which would fall under Section 35.

The claims falling under that section are to be dealt with by the Collector, or by the higher officer to whom an appeal would lie under the rules framed, and the decision of that officer is conclusive. The effect of that provision, in my opinion, is to oust the jurisdiction of the Civil Courts in respect of such claims. The jurisdiction of the Civil Courts is not ousted in terms; but in view of the scheme of the Act and the special procedure laid down for compensation for interruption to the supply of water to any land irrigated by a canal, it seems to me that the jurisdiction of the Civil Courts is ousted.

In either case the result is that the plaintiff's claim must fail. *Appeal dismissed.*

A.I.R. 1922 Bombay 9 (1).

MACLEOD, C. J. AND COYAJEE, J.

Vishnu Moreshwar Dabholkar and others —Defendants-Appellants

v.

Gangadhar Ganesh Dabholker and others —Plaintiffs-Respondents.

Appeal No. 290 of 1921, decided on 10th January, 1922, from the decision of Asst. J., Ahmednagar in A. No. 38 of 1920.

C. P. C., O. 2, R. 2—Partition suit—Subsequent suit for profits prior to suit for partition is barred.

A party is not entitled first to file a partition suit, and then when partition has been decreed, to file another suit, in effect, for accounts for a period prior to the partition. [P. 9, C. 2.]

P. V. Nijsure—for Appellants.

D. R. Patwardhan—for Respondents.

Macleod, C.J.:—First Appeal No. 246 of 1918 was an appeal against the decision of the First Class Subordinate Judge at Ahmednagar in Suit No. 741 of 1916. The parties were the same as the parties in the present Second Appeal No. 290 of 1921 which is now before us. Suit No. 741 of 1916 was a suit by the plaintiffs against the present defendants to recover possession of their four annas share in the Jahagir village of Khedle, and I expressed a hope when I gave judgment that it was the last of a series of suit between the parties. I was not aware at that time that still yet another suit was pending being Suit No. 548 of 1919 from which the present appeal arises.

The plaintiffs in this suit, after judgment was given by the High Court on the 3rd February, 1912, in Second Appeal No. 899 of 1908 declaring the shares of the parties of the Jahagir village, filed Suit No. 2 of 1912 claiming their share of the profits for the three years 1905-06, 1906-07 and 1907-08. They obtained a decree for Rs. 616-5-6 and interest in the lower Court and recovered that amount in execution. But eventually that decree was reversed by the High Court on the 26th August, 1915 and the defendant got a refund of the amount that had been paid to the plaintiffs. The ground for that decision of the High Court, as I understand it, was that the property was joint and that the suit would not lie between the co-sharers of joint family property for a share of that property, the proper remedy being by a suit for partition.

Accordingly the plaintiffs brought a partition suit No. 741 of 1916 to which I have already referred and partition was decreed. But before that suit was finally disposed of they filed this suit on the strength of the decree obtained in the lower Court claiming exactly the same amount which they had claimed in the previous Suit No. 2 of 1912.

Both the lower Courts decided in favour of the plaintiffs, but it is difficult to understand the reasons for those decisions. When the suit for partition was filed, then the plaintiffs were bound to include in that suit all the claims that they might have at the time the suit was filed in respect of the suit property.

There is no precedent for the proposition that a party is entitled first to file a partition suit and then when partition has been decreed, to file another suit, in effect, for accounts for a period prior to the partition. It has been contended before us that the result of the proceedings in suit No. 2 of 1912 was to change the nature of the plaintiffs' claim for their share in the profits for those three years and that therefore there was entirely a new cause of action on which the plaintiffs could base the present suit. I cannot see any foundation for that argument because the plaintiff's suit was dismissed in appeal. The fact that it was declared in the lower Court and the plaintiffs actually obtained the money which was afterwards refunded makes no difference to the original cause of action, the plaintiffs are not suing to recover what they had to refund in the previous suit but they are suing on the original cause of action on which the previous suit was based. Obviously if they wished to bring any claim for an account of the revenues of the suit village, prior to the partition, they should have included it in the partition suit, and not having done so, they are clearly barred from claiming it in a later suit. The decision of the lower Court is wrong and the suit is dismissed with costs throughout.

Coyajee, J.:—I agree.

Appeal allowed.

A.I.R. 1922 Bombay 9 (2).

MACLEOD, C. J. AND SHAH, J.

Venkatesh Damodar Mokashi—Plff. Appt.

v.

Mallappa Bhimappa Chikkalki and others —Defts-Respts.

S. A. No. 200 of 1921, decided on 2-12-1921, from the decision of the Asst. J., Belgaum in A. No. 174 of 1919.

T. P. Act, S. 54—Vendee given possession

but no sale-deed executed—Consideration received by vendor—Vendor cannot sue to recover possession.

The plaintiff, who sells an immoveable property to defendant, cannot claim possession from defendant-vendee who has paid the purchase-money and has been all along in possession, though no sale-deed has been executed. The equitable principles which should be applied to such facts are perfectly clear. (1916) 40 Bom. 498, 41 Bom. 438 (F.B.) Approved.

The defendant-vendee who is, and is entitled to remain, in possession though no sale-deed has been executed in due time, will not be able to sue the plaintiff for sale-deed; and so will have to remain in possession for 12 years before he can acquire a good title. [P. 11, C. 1.]

H. C. Coyajee with *A. G. Desai*—for Appellant.

Nilkanth Atmaram—for Respondent.

Macleod, C. J.:— The plaintiff's father Damodhar got a decree against defendants. In execution of that decree the suit property was put up for sale; and was purchased by Jayappa in 1905. In 1906, Jayappa purported to sell the property to Jayaram. But in 1909, it appears that Jayappa disregarding that sale got symbolical possession, one must presume, under his purchase at the Court-sale in 1905. In the same year, 1909, Jayaram sold back the property to Damodhar, and there seems good foundation for the suggestion that through Damodhar the execution creditor was the real purchaser, for in 1906 Damodhar agreed to re-sell the property to the 1st defendant at a certain price and the evidence shows that the price has been wholly paid, although Damodhar at the time, raised objection to receiving the balance of the purchase-money owing to there being delay in paying it.

The result is that Damodhar has agreed to sell the property to the 1st defendant, who was then in possession; and had all along been in possession since the time of the decree and the defendant paid the purchase price. It is quite true that the defendant has not got a sale-deed and the time has passed within which he could have sued Damodhar to get a sale-deed. But the equitable principles which should be applied to these facts are in my opinion perfectly clear.

In *Gangaram* v. *Laxaman Ganoba* (1), the plaintiff sued, for a declaration of title to and for possession of immoveable property from the defendant. He based his title upon a registered sale-deed dated the 5th December, 1911, from one Narayan. Prior to that date the plaintiff had notice of the execution of a contract of sale of the same property by Narayan to the defendant. It was held that the plaintiff having purchased with notice of the defendant's contract, his suit for possession must fail. The Court said,

> "The question is whether the defendant has a good defence to a suit by the purchaser from Narayan who can rely upon a registered sale-deed; and whether he can, notwithstanding the sale-deed, retain possession of the property on the grounds that the plaintiff purchased with notice of the defendant's contract. It is not contended that in the defendant's contract any date is fixed for performance, nor is there any evidence that before he learnt of the plaintiff's purchase the defendant had any notice that the vendor would refuse performance. Therefore, at the date of the plaintiff's suit, namely, the 16th of April, 1912, a suit by the defendant against his vendor for specific performance would have been within time and if the plaintiff was at the date of the suit in the position of a trustee for the defendant, the latter is clearly entitled to enforce that position up to the end of the litigation."

It must not be taken from the above remarks that the defendant would be in a worse position in relation to the plaintiff, if at the date of the suit his right to sue his vendor for specific performance had been barred, since he is a defendant now relying on his possession.

In *Lalchand Motiram* v. *Lakshaman Sahadu* (2), the facts of the case were different. The defendant who remained in possession had filed a suit for specific performance against the vendor, which had been dismissed and accordingly, it was held that the plaintiff who had executed a conveyance of the property without its being registered was entitled to recover against his purchaser.

Then there is a Full Bench decision in *Bapu Anaji* v. *Kashinath Sadhoba* (3), where it was decided that "where a plaintiff being the owner of certain immoveable property seeks to recover possession of that property and there are no facts operating to the prejudice, it is a valid defence to the suit that the plaintiff has agreed to sell the property to the defendant, the agreement being at the date of suit still capable of specific

(1) (1916) 40 Bom. 498=37 I.C. 360=18 Bom. L. R. 455.

(2) (1904) 28 Bom. 456=6 Bom. L. R. 610.

(3) (1917) 41 Bom. 438=39 I. C. 103=19 Bom. L. R. 100 (F. B.).

enforcement but there being no registered conveyance passing the property to the defendant who has taken possession under the agreement for sale and is willing to perform his part of it with the plaintiff. That decision was based on the fiduciary aspect of the vendor's position and the impropriety of permitting him to succeed against his vendee in a suit for possession. That argument must also apply where the vendee in possession has allowed the time for filing a suit for specific performance to expire.

In this case, therefore, the defendant is entitled to remain in possession against the plaintiff. He will not be able to sue the plaintiff for a sale-deed, and so will have to remain in possession for 12 years before he can acquire a good title, but in the light of our decision, the plaintiff might now be well advised, if he passed the sale-deed. The appeal will be dismissed with costs.

Shah, J.:—I agree.

Appeal dismissed.

A. I. R. 1922 Bombay 11.

MACLEOD, C. J. AND SHAH, J.

Govind Lal Bansilal—Appellant

v.

Bansilal Motilal—Respondent.

O. C. J. Appeal No. 51 of 1921, decided on 16th December, 1921, against the decrees of Macleod, C. J. and Shah, J. and printed as A. I. R. 1921 Bombay 328.

Civil P. C. (Act V of 1908), S. 110, Clause 3—Substantial question of Law, meaning of—Right or wrong exercise of discretion by the High Court is not a substantial question of law.

A wrong exercise of discretion in refusing to grant leave under Clause 12 of the Letters Patent to file an additional written statement is not a substantial question of law.

Whether discretion has been rightly or wrongly exercised by the High Court may in some cases involve a question of law; but it cannot be said that any substantial question of law within the meaning of Clause 3 of Section 110 of the Civil Procedure Code would arise in such a case.

[P. 12, C. 1.]

Thomas Strangman—for Appellant.

Taraporevalla, Jinnah & Munshi—for Respondent.

Macleod, C. J.:—This is an application for a certificate for leave to appeal to the Privy Council. The first defendant wished to file a counter-claim at a very late stage of the case, and two questions arose: (1) whether the Court had jurisdiction to accept the counter-claim; and (2) whether, if it had jurisdiction, it should exercise its discretion in granting leave under Clause 12 of the Letters Patent. This Court held it had jurisdiction to entertain the counter-claim if it was considered on the facts of the case, that leave should be granted, but considering the particular facts of the case it came to the conclusion that leave should not be granted.

The question, therefore, arises whether this is a case which should be certified as a fit one to appeal to the Privy Council and it can only be so if the appeal involves some substantial question of law. It has been argued by the appellant that because he had a question of law decided in his favour, therefore, the appeal involves some substantial question of law.

Reliance for that proposition has been placed on the case of *Moran* v. *Mittu Bibee* (1). But, with due respect, that is a proposition which should not, considering the facts of this case, be applied. The only ground of appeal which the appellant could have, if the appeal was taken to the Privy Council, would be that the Court had wrongly exercised its discretion in refusing to grant leave, and as soon as his appeal was opened the point would be taken that the question of the exercise of its discretion by the lower Court did not involve any substantial question of law.

No doubt, if the appeal is once admitted and opened for argument, then the question of law, in which the appellant has succeeded in the lower Court, can be contested by the respondent. But I do not think that it follows from the words of the last clause of Section 110, Civil Procedure Code, that because that course is open to a respondent, therefore the appeal itself involves some substantial question of law, so that we can issue a certificate.

I think myself what this Court has to consider is the appeal itself, and as I have already stated, the only appeal, which the appellant could make, would be to ask the Privy Council to hold that our discretion has been wrongly

(1) (1877) 2 Cal. 228.

exercised. Whether the discretion has been rightly or wrongly exercised may in some cases involve a question of law ; but it cannot be said that any substantial question of law would arise.

I think, therefore, that this is not a case in which a certificate should be granted, and the rule will be discharged with costs.

Shah, J. :—I agree. Without expressing any dissent from the cases cited in the argument *viz.*, *Moran* v. *Mittu Bibee* (1), *Ashghar Reza* v. *Hyder Reza* (2), and the observations of Ranade, J. in *Vishwanbhar* v. *Emperor* (3). I think the present application for leave to appeal to the Privy Council should be refused. Section 110, Civil Procedure Code, requires that the appeal should involve some substantial question of law; and it is difficult to say on the judgments of the Court that the point, that the discretion was wrongly exercised in refusing to grant leave under Clause 12 of the Letters Patent, is a substantial question of law.

It is true that in refusing leave, I have referred to the general consideration as to the jurisdiction of the Court to deal with immoveable properties situated outside British India. But as the discretion was exercised on the facts of the case, I cannot say that that ground can be treated as a substantial question of law within the meaning of Section 110. I should have been glad to see my way to let the appellant take his case to the higher tribunal. But in view of the provisions of Section 110 of the Code, I do not see how we can grant the certificate prayed for.

Rule discharged.

(2) (1889) 16 Cal. 287.
(3) (1895) 20 Bom. 629.

A.I.R. 1922 Bombay 12.

MACLEOD, C. J. AND SHAH, J.

Vacuum Oil Co.—Plaintiffs-Appellants

v.

Secretary of State—Defendant-Respondent.

O. C. J. Appeal No. 47 of 1921, decided on 16th December, 1921, from the decision of J. Kajiji.

Sea Customs Act (VIII of 1871), S. 30, Cls. (a) *and* (b)—"*Wholesale cash price*" *means the market price at the time and place of importation.*

The expression " wholesale cash price" used in Section 30, Clause (a) of the Sea Customs Act clearly indicates that it must mean the wholesale cash price for which the goods of like kind and quality are sold, or are capable of being sold, at the time and place of importation. Those words clearly indicate that it must be the price which the importers here would be able to realise on wholesale disposal of the goods by them to any person after importation. The expression could not be construed as meaning the price which they may have paid for the purpose of importing goods to Bombay. Clause (b) of Section 30 of the Act only applies when the wholesale cash price, of the goods imported, is not ascertainable. This clause is added in order that the real value might be ascertained where no wholesale cash price is ascertainable [P. 13, C. 2; P. 14, C. 1.]

Desai, Coltman and *Campbell*—for Appellants.

Thomas Strangman and *O'Gorman*—for Respondent.

Macleod, C. J. :—This is a suit filed by the plaintiffs against the Secretary of State praying (1) for a declaration that the method of valuation adopted by the Collector of Customs at Bombay in respect of the plaintiff's Mobile oils imported into India was perverse, wrongful, invalid, illegal and *ultra vires* ; (2) that it might be declared that the sum of Rs. 3,391-2-0 had been perversely, wrongfully and illegally exacted from the plaintiffs by way of customs duty in respect of their said oils and contrary to the provisions of the Sea Customs Act ; (3) that it might be declared that in the circumstances of this case there was no wholesale cash price ascertainable for which the plaintiff's Mobile oils were sold or were capable of being sold at the time and place of importation thereof within the meaning and principle of Section 30 (*a*) of the said Sea Customs Act ; (4) that it might be declared that in any event in the circumstances of the case the invoice price returned by the plaintiffs in the bills of entry in respect of the plaintiff's said oils was the correct basis on which to assess the customs duty on the plaintiff's oils under the Sea Customs Act.

The suit was dismissed by Mr. Justice Kajiji.

The question in appeal is, what is the proper construction of Section 30 of the Sea Customs Act (VIII of 1878).

Under Section 29 of the Act:—

"On the importation into, or exporta-

tion from any customs-port of any goods whether liable to duty or not, the owner of such goods shall, in his bill of entry or shipping bill, as the case may be, state the real value, quantity and description of such goods to the best of his knowledge and belief, and shall subscribe a declaration of the truth of such statement at the foot of such bill.

In case of doubt, the Customs-Collector may require any such owner or any other person in possession of any invoice, broker's note, policy of insurance or other document, whereby the real value, quantity or description of any such goods can be ascertained, to produce the same, and to furnish any information relating to such value, quantity or description which it is in his power to furnish. And thereupon such person shall produce such document and furnish such information."

Then under Section 30 :—

" For the purposes of this Act the real value shall be deemed to be—

(*a*) the wholesale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation or exportation, as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof or

(*b*) where such price is not ascertainable, the cost at which goods of the like kind and quality could be delivered at such place without any abatement or deductions except as aforesaid."

No doubt, from the prayers of the plaint, it would seem that the first argument of the plaintiffs was that there was no wholesale cash price which could be ascertained under Section 30 (*a*) of the Act; but from the evidence in the case it is perfectly clear that it would be possible to ascertain the wholesale cash price at which Mobile oil could be sold in Bombay, the place of importation, at or about the time of importation. And since the wholesale cash price could be ascertained, it seems perfectly clear that the wholesale cash price was then the real value of the goods.

But there is the second argument that the term " wholesale cash price " has another meaning, not the popular meaning; but this meaning, as far as I can gather from the arguments advanced, is the same as " the cost of the goods to the importer " on the basis that the goods should be taken as being sold to the importer at the price which it cost him to lay them down in Bombay. If that is the case, as pointed out by the learned Judge, there would be no necessity for sub-clause (*a*) of Section 30 of the Act, as in every case the importer would be entitled to have it decided that the real value of the goods imported was the cost of the importation to him.

It has been pointed out by the learned Advocate-General that it is not always possible to ascertain the wholesale cash price of goods imported, and it is, therefore, necessary in such a case that some provision should be made for ascertaining the real value ; and so sub-clause (*b*) was added in order that the real value might be ascertained where there is no wholesale cash price. In this case, as I have already pointed out, there is no difficulty whatever in ascertaining the wholesale cash price of Mobile oil sold in Bombay and, therefore, that is the only test to be adopted for ascertaining the real value of the goods. That is the plain meaning of the section. It is difficult to my mind to see how it can have any other possible meaning, or how the words " wholesale cash price " can possibly be said, as argued by the appellants, to be the equivalent of " the cost to the importer."

The judgment of the Court below was right, and the appeal must be dismissed with costs.

Shah, J. :—I concur. I desire to deal briefly with the two arguments which have been urged on behalf of the appellants, *viz.*, that under Clause (*a*) of Section 30 of the Sea Customs Act the wholesale cash price is not the price which the importer realises on a wholesale disposal of the goods by him but the price which is actually paid by him for importing the goods in Bombay.

It is further urged that under Clause (*b*), where such price is not ascertainable, the real value is the cost at which the goods of the like kind and quality could be delivered at such place, without abatement or deduction except as aforesaid, for the purposes of taxation, and that no different standard could have been intended to be adopted for the purpose of taxing the goods under Clause

(*a*). It is also urged that as a provision for taxing the subject, it must be strictly construed.

As regards this last general consideration, there can be no question. No doubt Section 30 must be construed strictly and if the words are ambiguous or admit of any doubt, the construction in favour of the subject may be adopted. But having regard to the terms of Section 30, both the contentions urged on their behalf must be disallowed.

As regards the contention that the wholesale cash price within the meaning of Clause (a) must be the price paid by the importer and not the price realised on the wholesale disposal of the goods at the place and time of importation, I think the expression used clearly indicates that it must mean the wholesale cash price for which the goods of like kind and quality are sold, or are capable of being sold, at the time and place of importation. Those words clearly indicate that it must be the price which the importers here would be able to realise on a wholesale disposal of the goods by them to any person in Bombay. The expression could not be construed as meaning the price which they may have paid for the purpose of importing goods to Bombay.

As regards Clause (b), in terms, it applies where the wholesale cash price is not ascertainable. Here the wholesale cash price being ascertainable, the clause cannot apply. There is no reason to suppose that the standard adopted under Clause (b) for taxation would be necessarily adopted as a standard under Clause (a). It may well be, as it appears to be the case on the language of the section, that the Legislature has adopted one test for cases covered by Clause (a) and is satisfied with the next best test in other cases, to which the first test cannot be applied. The argument is based on the assumption that the test in both cases must be the same, for which the language used does not afford any warrant.

Lastly, it is urged that the Legislature could not have intended to tax the profits, which the importer would make at the time and place of importation; and that the construction adopted by the lower Court involves that result. Here again the answer is that we can only decide on the language used by the Legislature and not upon such *a priori* considerations as the argument suggests.

I think, therefore, that the decision of the trial Court is perfectly right.

Appeal dismissed.

A.I.R. 1922 Bombay 14.

MACLEOD, C. J. AND SHAH, J.

Mussa Mahomed—Plaintiff-Appellant

v.

Motilal Itchalal—Defendant-Respondent.

O. C. J. Appeal No. 106 of 1921, decided on 20th December, 1921, against the decision of Justice Fawcett.

Specific performance—Agreement to sell immoveable property—Conduct of parties treating time as not of essence—Subsequent notice by one party to complete contract within a short time—Court can enforce contract beyond time fixed if the notice is unreasonably short.

The special jurisdiction of equity to disregard the letter of the contract in ascertaining, what the parties to the contract are to be taken to have really intended as regards its time of performance, may be excluded by any plainly expressed stipulation. (A.I.R. 1915 P.C. 83), followed.

Prima facie equity treats the importance of such time-limits as being subordinate to the main purposes of the parties, and it will enjoin specific performance notwithstanding that, from the point of view of Court of law, the contract has not been literally performed by the plaintiff as regards the time limit specified.

This is merely an illustration of the general principle disregarding the letter for the substance which Courts of equity apply when, for instance, they decree specific performance with compensation for a non-essential deficiency in the subject-matter. But equity will not assist where there has been undue delay on the part of one party to the contract and the other has given him reasonable notice that he must complete within a definite time. [P. 16, Cs. I and 2.]

There being nothing in the surrounding circumstances to indicate that the defendant would be so prejudiced by further delay in the completion of the contract that equity would not assist the plaintiff in getting it performed, and considering the extremely leisurely way in which both the parties had proceeded from the date of the contract, there was no reason why the defendant should be entitled to demand of the plaintiff that the matter

should be completed within four days and that in default the contract should be considered as broken. Therefore there being no special circumstances which would demand that the contract should be completed on the 1st September, 1919, the notice given on 27th August, 1919 to complete the contract within four days was not reasonable, and it offended against the general principles of equity which guide the Courts dealing with a case of this description. [P. 16, C. 2.]

Therefore the plaintiff was entitled to the assistance of the Court in obtaining specific performance of the contract. [P. 17, C. 1.]

Mirza and *Thomas Strangman*—for Appellant.

Desai and *Mulla*—for Respondent.

Macleod, C. J.:—The plaintiff filed this suit for specific performance of an agreement, dated the 27th February, 1919, whereby the defendant agreed to sell to the plaintiff certain immoveable property in Bombay for Rs. 5,000. Clause 3 of the agreement was as follows:—

"The purchaser shall pay the balance of the purchase-money within three months from the date hereof, time being of the essence of the contract, on the execution by the vendor and by all other necessary parties (if any whom the vendor agrees to procure to join in the execution) of the conveyance of the said hereditaments, etc."

Whatever may have been the effect of that clause in the agreement, it is now admitted that the parties agreed that the time for completion of the contract should be extended beyond the three months mentioned in that clause. It must also be admitted that there was considerable delay on both sides in preparing requisitions for title, in answering the requisitions and in the preparation and approval of the draft conveyance.

On the 23rd August, 1919, the defendant's solicitors wrote:—

"We extremely regret that we have not yet received the engrossment of the conveyance for our comparison. Requisitions on title were answered long ago. Your clients had inspection of the trust deed, and they have been satisfied on all the points. Our client has waited sufficiently long for completion."

And the letter concluded:—

"We are therefore instructed to request you to send us the engrossment for comparison. The draft conveyance has already been sent to you duly approved. We are expecting the engrossment within four days from the receipt hereof by you."

It is admitted that letter was not received by the plaintiff's solicitors until the 25th August, 1919, when they wrote:—

"With reference to your letter, dated 23rd instant we beg to state that the delay was on your client's part in not replying to the requisitions in time and not furnishing the Municipal bill for a very long time. We received the Battaki only recently and have since then taken the engrossment in hand which we shall let you have as soon as it is ready. Your client's suggestion, that our client has no money or that he is trying to secure a purchaser, is an imaginary one. Our client's moneys are lying idle with him since two months past and he is more eager to complete this matter than your client."

The defendants' solicitors replied on the 27th August, 1919:—

"We are in receipt of your letter of the 25th instant. It is not true that our client delayed the matter. The Municipal bill was sent long ago and as you did not get the Battaki certified in time you asked our client to send a new bill. With reference to the second para. of your letter we have not yet received the engrossment duly stamped for our comparison. It is strange that the engrossment should take such a long time. Please therefore note that unless the sale is completed before Monday 4 P. M., time being of essence, our client will treat the contract as broken by yours, will forfeit the earnest money and proceed in the matter as advised."

That letter was received on the 28th August, 1919 which was a Thursday, and it is admitted that the plaintiff did nothing further until the 2nd September, 1919 when the plaintiff's solicitors wrote:—

"With reference to your letter, dated the 27th ultimo we beg to state that you sent us only one Municipal bill after a very long delay, which delayed the certifying of the Battaki. It is not true that we did not get it certified in time. It would be absurd to expect to get the Battaki certified without Municipal bill. We now send you the engrossment of

the conveyance for being compared by you, which please return duly compared by you."

On the same day the defendant's solicitors wrote :—

"In continuation of our letter to you herein of the 27th ultimo, we are instructed to state that our client has forfeited the earnest money and reserves his right to proceed further against your client as he may be advised."

Thereafter the plaintiff tendered the purchase-money but it was refused, and consequently the plaintiff had to file this suit.

Now, the law on the subject is clearly laid down in the case of *Jamshed Khodaram* v. *Burjorji Dhunjibhai* (1). After referring to the decision of Lord Cairns in *Tilley* v. *Thomas* (2), their Lordships continue :—

"Their Lordships will add, to the statement just quoted, these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what, the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance, may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time-limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time-limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation.

"*Prima facie*, equity treats the importance of such time-limits as being subordinate to the main purposes of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of law the contract has not been literally performed by the plaintiff as regards the time-limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which Courts of equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter.

"But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time."

Therefore, assuming that, on 27th August, 1919, there had been unnecessary delay on the part of the plaintiff which entitled the defendant to give him reasonable notice that he must complete within a definite time, the decision in this case depends entirely on whether in equity it can be considered that the defendant gave reasonable notice by his solicitors' letter of the 27th August, 1919. It is impossible to lay down any general rule as to what period can be considered as reasonable. It must depend entirely upon the various circumstances which are present in each case as it arises. But apart from those considerations, it would appear to me that in any case four days would not be reasonable notice for the completion of a contract of this nature.

No doubt, what actually was required to be done on the 27th August, 1919, was only the engrossment and stamping of the conveyance and handing over of the purchase-money, and it might be said all that could be done within the space of a few hours. But that is not the only consideration which must weigh with the Court. One has to consider whether, as a matter of fact, from the surrounding circumstances the defendant would be so prejudiced by further delay in the completion of the contract that equity would not assist the plaintiff in getting it performed.

Now, it cannot be said in this case that it would make very much difference to the defendant whether the contract was completed on Monday the 1st September, 1919, or a few days later. Considering the extremely leisurely way in which both the parties had proceeded from the date of the contract, there was no reason why the defendant should be entitled to demand of the plaintiff that the matter should be completed within four days and that in default the contract should be considered as broken.

Therefore, there being no special circumstances in the case which would demand that the contract should be completed on the 1st September, 1919, it appears to me that that notice was not reasonable and that it offended against the

(1) A. I. R. 1915 P.C. 83=40 Bom. 289=43 I.A. 26 (P.C.).
(2) (1868) 3 Ch. App. 61=16 W.R. 166=17 L.T. 422.

general principles of equity which guide the Courts in dealing with a case of this description.

I think, therefore, that the decision of the Court below was wrong and that the plaintiff was entitled to the assistance of the Court in obtaining specific performance of the contract.

There will be a decree, then, for the plaintiff to the effect that on his paying the balance of the purchase price, the defendant should execute the conveyance.

The plaintiff to complete the sale within one week.

The defendant to pay the costs of the suit and of the appeal.

Shah, J.:—I concur.

Appeal allowed.

A. I. R. 1922 Bombay 17.

KAJIJI, J.

Dinshaw J. Javery—Plaintiff

v.

Secretary of State for India—Defendant.

O. C. J. Suit No. 3473 of 1919, decided on 4th November, 1921.

Bombay Abkari Act (Bom. Act V of 1878), Ss. 6 and 7—Public servants (non-covenanted) of Government in Excise Department—Appointed by Commissioner—Dismissal—Provisions of S. 7 must be strictly complied with.

The plaintiff was employed as Acting Inspector in the Excise Department on a salary of Rs. 125 per mensem. He was dismissed from the service by the Commissioner of Customs, after making a formal inquiry into certain charges of misconduct brought against him. Plaintiff filed a suit against the Secretary of State for India for wrongful dismissal, as the inquiry in respect of charges of misconduct against him was not conducted according to the regulations framed by Government for dismissal of the non-covenanted servants and therefore claimed Rs. 50,000 as damages for wrongful loss of service and injury to his reputation.

Held:—that the plaintiff did not hold the appointment at the will and pleasure of the Government that the plaintiff was appointed in the Excise Department by the Commissioner of Customs under Section 6 of the Bombay Abkari Act, 1878, and not by the Government direct. *Gould* v. *Stuart*, (1896) A. C. 575 followed.

The Legislature by statute has restricted the power of dismissal under Section 7 of 1878 and that provision must be strictly complied with before an officer is dismissed. [P. 18, Cs. 1, 2.]

Taraporevalla and *Setalvad*—for Plaintiff.

Desai and *Bahadurji*—for the Crown.

Kajiji, J.:—The plaintiff has filed this suit to recover Rs. 50,000 as damages for his wrongful dismissal from service.

It appears that the plaintiff was employed as an Acting Inspector in the Excise Department on a salary of Rs. 125 a month and by an order dated the 13th September, 1917 he was dismissed from service by Mr. Arthur, Commissioner of Customs, Salt, Opium and Abkari, Bombay.

Two preliminary issues have been raised in the suit: (1) whether the plaintiff held his appointment at the will and pleasure of the Crown, and (2) if so, whether the plaint discloses any cause of action?

From the cases cited at page 213 in the case of *Jehangir M. Cursetji* v. *Secretary of State* (1) Mr. Justice Tyabji stated that in all those cases it was laid down that you cannot limit the power of the Crown to dismiss its officers at pleasure. It is conceded by Mr. Taraporevalla for the plaintiff that if the term of employment of the plaintiff was at will and pleasure of the Crown then the Crown is entitled to dismiss the plaintiff without assigning any reason at all. But Mr. Justice Tyabji has qualified the above proposition to this extent that the power of the Crown to dismiss its public officers is necessarily limited by any statutory provision that may have been enacted for the benefit of such public servants, and it may not have application to such of the servants of Government as are not charged with functions, etc. Mr. Taraporevalla has argued that the plaintiff was employed under Section 6 of Act V of 1878 and Section 6 enacts that:—

"To aid the Collectors in carrying out the provisions of this Act, the Commissioners may, subject to such orders as may from time to time be passed by Government in this behalf, appoint such subordinate officers with such designation, and assign to them respectively such powers and duties under

(1) (1903) 27 Bom. 189=5 Bom. L. R. 30.

this Act, as they deem fit.'

Mr. Taraporevalla has urged that the appointments of subordinate officers in the Excise Department are regulated by Section 6 of the Act and that power has been delegated by the Government to the Commissioner and the Commissioner is the only person who can make the appointments subject to the order limiting the number of subordinate officers who have to be appointed for the purpose of carrying out the provisions of Act V of 1878. The appointment is not made by Government direct.

From the record that has been shown to me I find that these appointments in the Excise Department are made under the signature of the Commissioner and I have no doubt in my mind that these appointments of officers in the Excise Department and of the plaintiff was made under Section 6 of Act V of 1878. Then Section 7 provides in what cases, under what circumstances, and after what enquiry, can any such officer be dismissed. Section 7 provides :—

"The Commissioners may at any time after enquiry, recorded in writing, fine, dismiss, suspend or reduce any subordinate officer appointed, or any officer on whom any additional powers or duties have been conferred or imposed by them under the provisions of the last preceding section, for any breach of departmental rules or discipline, or for carelessness, unfitness, neglect of duty or other misconduct."

Mr. Taraporevalla has urged that having regard to the provision of Section 7 of Act V of 1878, the Government's powers of dismissal of one of its officers in the Excise Department have been fettered and restricted by statute and if that is so the rule laid down in the case of *Gould* v. *Stuart* (2) must apply.

The Advocate-General on behalf of the Government has urged that Section 7 only restricts the power of the Commissioner and does not restrict the power of the Government. But where Government has delegated the power of appointment to other officers and if that power is restricted as to dismissal then it has to be considered whether the Legislature has restricted the power of dismissal or not. In my opinion Section 7 does restrict the power of the Commissioner for dismissal and therefere the employment of the plaintiff ceases to be at the pleasure and will of Government and the provisions of Section 7 of the Act must be strictly complied with before such officer can be dismissed. The case of *Gould* v. *Stuart* is a case in point.

Mr. Bahadurji says that the dismissal has to be confirmed by the Government. That, however, does not affect the merits of this case. The first order has to be passed by the Commissioner and it may be that a formal sanction or confirmation has to be obtained; it is a mere formality that has to be gone into.

In my opinion the Legislature by statute has restricted the power of dismissal under Section 7 of Act V of 1878 and that provision under Section 7 of the Act is made for the protection of officers employed in the Excise Department.

Therefore, the preliminary issues, *viz.*, (1) will be answered in the negative, (2) in the affirmative, and (3) is not necessary. Costs costs in the cause.

Issues answered.

(2) (1896) A. C. 575=75 L. T. 110=65 L. J. P. C. 82.

A.I.R. 1922 Bombay 18.

MACLEOD, C. J. AND SHAH, J.

Shrinivas Lingo Nadgir—Plaintiff-Appellant.

v.

Secretary of State for India—Defendant-Respondent.

Second Appeals Nos. 132, 157 and 159 of 1918, decided on 16th September, 1921, from the decision of the District Judge, Dharwar in Civil Suit No. 2 of 1913.

Vatan—*Patilki and Kulkarniki Vatan—Possession of Jahagirdar, is not adverse to* Vatandars *until the latter is made aware of setting up of title by the former—Office of Patilki and Kulkarniki cannot be acquired by adverse possession—Adverse possession.*

Assuming that the Nadgirs were entitled either by agreement or by custom to get back their *Vatan* lands on payment of *Judi*, time would not begin to run against them until they were made aware that the *Jahagirdars* were setting up a title to hold the *Vatan* lands in their own right, Nor is it easy to see how the *Jahagirdars* could acquire the offices of Patil and Kulkarni by adverse possession.

The *Vatan* lands had not become the absolute property of the *Jahagirdars* considering the way of, in which they were treated both by Government and its

assignees the *Jahagirdars*.

[P. 24, C. 2; P. 25, C. 1.]

Tyabji with *K. H. Kelkar*—for Plaintiff.

S. S. Patkar—for Defendant No. 1.

Coyajee with *A. F. Desai*—for Defendants Nos. 3 to 7.

D. S. Mandlik for *B. K. Mehendale*—for Defendant No 13.

Macleod, C. J.:—The village of Hebli was granted in *Jaghir* to the three branches of the family. Laxman Rao, plaintiff and defendants Nos. 12 and 13 were the oldest members of the branches. The Nawab of Savanur granted the *Jaghir* in the year 1749. There were three *Vatan* offices in the village, *viz.*, Kulkarni, Patil and Nadgir, of which the first two offices were allotted 80 *Mars* of land while the latter had 40 *Mars* of land. All the three *Vatan* were resumed by the Government for non-payment of the *judi* before 1723. Plaintiff's family was granted the *Vatan* land and the offices, which were in existence prior to the grant. The *Vatan* lands were entered in the Government record as *Kamavishi*. But the *Jahagirdars* omitted the designation of *Kamavishi* in their own books.

The Collector in 1906 held and this decision was affirmed by the Government in 1908—under Bombay Hereditary Offices Act, 1874, that the Nadgir defendants were entitled to offices of the Patil and Kulkarni and to the lands attached to the offices. The Collector further held that the emoluments should be recovered from the *Jahagirdars*. In 1913 the Government levied a sum of Rs. 969 from the *Jahagirdars* for payment to the Nadgir defendants.

The plaintiff, a member of the *Jahagirdar* family, filed the present suit to recover back the sum of Rs. 969, and for a declaration that the plaintiff and defendants Nos. 12 and 13 should be declared *Vatandar* Patils and Kulkarnis by virtue of the grant of 1748, and in the alternative by reason of their long and exclusive possession and enjoyment of the offices until 1908; that Vatan Register of Hebli as framed should be cancelled after declaring that the 120 *Mars* entered in the *Vatan* Register were not *Vatan* property and not liable to contribution

The Secretary of State for India (defendant No. 1) contended *inter alia* that the suit was barred by Section 4 (a) of Bombay Revenue Jurisdiction Act, 1876, by Section 25 of the Bombay Hereditary Offices Act, 1874, and by limitation as the plaintiff sought to rely on the order of the Collector of the 28th November, 1906. Defendant 4 on behalf of Nadgirs generally supported defendant No. 1. [After setting out the pleas as indicated above his Lordship continued:] Exhibit 471 is a memorandum, dated the 12th November, 1864, written by Col. Etheridge as Alienation Settlement Officer S. D. in reply to the Revenue Commissioner's endorsement of the 6th September. That document is not forthcoming but it would seem as if an inquiry had been made regarding certain lands which are set out in the memo. Items 16 and 17 are the 120 *Mars* now in suit. The memo. para. 4 says:—

"These items were all settled to be Kadim in 1862 by Major Etheridge upon the evidence then forthcoming which, although defective, was the best procurable. There was no evidence available from the Peshwai records. It is remarked, however, that the land rolls, referred to in the para. preceding, show that the Heblikars at the date of the acquisition of the village did not receive the items 15, 16 and 17 occupying 200 *Mars* as *bona fide* Khalsat but as Kamavishi, though, as it appears from an order, dated 1792 from P. R. Patwardhan a competent authority to Trimbakrao Anna, the Subedar of Dharwar Taluka, that the Kamavishi management at that date still remained as before and as there is nothing to show that any subsequent period even up to the present time had been altered with the exception of 7½ *Mars* 13 *bighas* which, at sometime unknown, had reverted to the Nadgirs, it may be allowed that the Kamavishi management of the remaining 92½ *Mars* and 6 *bighas* has assumed a permanency of tenancy which cannot be justly interfered with."

Major Etheridge then recommended that 7½ *Mars* and 3 *bighas* should be made amenable to settlement as held from Government when the orders for the settlement of alienated villages should be authorised. The remainder, Major Etheridge thought, should belong to the Heblikars.

With regard to this document the learned Judge remarks:—

"Exhibit 471 embodies the decision of the Inam Commissioner referred to in

issue 10. The decision is in the form of a recommendation to Government. The decision is one under Bombay Act XI of 1852; although Col. Etheridge signed as Alienation Settlement Officer, Col. Etheridge was both Inam Commissioner under Act XI of 1852 and Alienation Settlement Officer. The inquiry made under the Act in question related to claims against Government on account of Inam and other estates wholly or partly exempt from the payment of land revenue It is hardly necessary to observe that the Act applied to the *Watan* lands of village officers and servants (See Schedule B, rules V. III, X.")

Unfortunately it is necessary to observe that, by the 5th proviso to Rule VIII, to adjudicate on *Vatans* such as those in suit was expressly excepted from the powers of the Inam Commissioners, and that is probably the reason why Major Etheridge signed Exhibit 471 as Alienation Settlement Officer, making recommendations for the guidance of the Revenue Commissioner instead of recording a decision as Inam Commissioner of Exhibit 312 which is the decision of the Inam Commissioner that the village of Hebli was *Saramjam* and not Sarva Inam. Admitting that the advice of Major Etheridge was acted upon and that only 7¼ *Mars* and 3 *bighas* were entered as amenable to settlement, the question arises, not only whether Government was right in reversing that decision on the advice of their Revenue Officers in 1908, but also whether Government had the power to do so.

The learned Judge considered that advice was based on an erroneous view of the effect of a judgment of the High Court in Civil Suit No. 83 of 1868, App. No. 3 of 1876, *Ramchandrarao Raghunath* v. *Bhisto Shankar Nadgir* (1). He then says: "Upon issue 10 my finding is that the decision of Government upon Exhibit 471 is final." But the issue was whether the decision of the Inam Commissioner and Alienation Settlement Officer was final. "As far as I can gather from the evidence, that decision was passed not earlier than 1865 and was the only decision in the matter arrived at by Government under Act XI of 1852."

It will now be advisable to turn to the proceedings of the Revenue Authorities which culminated in the final order of 1908 so as to ascertain what view was taken by the High Court decision in R. A. 3 of 1876, and then I shall consider that decision so as to be able to form an opinion whether that view was correct. In 1875, after the passing of the *Vatan* Act of 1874, the Nadgirs presented a petition to the District Deputy Collector asking that a Register of the Patilki and Kulkarniki *Vatan* might be prepared. That officer Mr. Anding gave his decision on the 10th July, 1884 (Exhibit 327). He said:

"The *Jahagirdars* claim the Patil's and Kulkarni's *haks* because they say there is no Kadim *Vatan* for these offices, that the people now claiming cannot show enjoyment of office in their families and that they have carried on the duties through Karkoons employed by themselves. The Nadgirs on the other hand say that they have and hold Kadim *Vatan* for the Patil and Kulkarniship. The points for consideration are:—

(1) Has there been a Kadim *Vatan* for the Patilki and Kulkarniki office?

(2) Have the individuals now claiming as patils and Kulkarnis enjoyed the offices claimed in their families?

The Nadgirs do not produce Sanads or other deeds of grant to show when they received the *Vatan* claimed, but from the papers recorded in the case it appears that on account of the Nadgirs' Patilki and Kulkarniki of Hebli there was a grant of 200 *Mars* of land, that of this 7¾ *Mars* are still held for Patilki and Kulkarniki and that the rest of the land is with the *Jahagirdars* in Kamavishi because the *Vatandars* did not pay up the *judi* due to the Inamdars as *Mamool*, etc., etc.

From the papers recorded it seems to me that the *Jahagirdars* have conducted the duties of the Patil and Kulkarnis' offices for a long time through Karkoons in their pay.

For all these reasons I decide that the claims of the *Jahagirdars* and of the Nadgir claimants are both inadmissible and that the Patilki and Kulkarniki of Hebli are both Amani. The nominations to office should in future be made by Government and the Potagi should be paid by the *Jahagirdars* from the revenue derived from the *Vatan* land in their possession."

The Collector's decision (Exhibit 326) was not recorded until the 14th February, 1890. He agreed with Mr. Anding that the two offices should be treated as

(1) (1877) P. J. 47.

Amani or stipendiary, but he did not think it would be just or equitable to deprive the *Jahagirdars* altogether of their right of nomination. The parties concerned should be left to establish *inter se* their respective rights in a Court of law. Until they did so, no right of nomination should be allowed to their party.

On the 31st October, 1890, the commissioner S. D. (Exhibit 325) forwarded the papers to Government suggesting that they should revise the order of the Collector as it was the duty of the Collector, under Section 25 of the *Vatan* Act, to determine the custom of the *Vatan* as to service and what persons should be recognized as representative *Vatandars* for the purpose of the Act and to register their names.

The Commissioner pointed out that there was a Patil and Kulkarni *Vatan* held at one time by the Nadgir family, consisting of 200 *Mars* which, with the exception of 7¼ *Mars* 3 *bighas*, had passed into the possession of the Hebli Inamdars and was entered as Kamavishi. The Nadgirs made several attempts to regain possession of portion of the estate but ineffectually until Bhisto Shankar obtained, by suit, restoration of 22 *Mars* from the heirs of Ramchandra Raghunath the decision being confirmed by the High Court in R. A. 3 of 1876. Their judgment made it superfluous to cite the numerous documents put in in the course of many years' correspondence between the applicants, the Commissioner's Office, and that of the Alienation Department which were held to be equally worthless.

As the judgment turned chiefly on the interpretation of the term Kamavishi it might be held to apply for the purposes of the then inquiry to the whole of the *Vatan* which was entered under that heading and it went against the contentions of the Inamdars that the *Vatan* had passed absolutely into their possession.

The Commissioner, therefore, advised that the Collector should be directed to hold a fresh inquiry and to pass an order on the evidence that might be produced before him according to law. Annexed to that letter, was the precis of 38 documents produced by the Nadgirs and 23, produced by the *Jahagirdars* in support of their respective claims. Exhibit 324 is a Government Resolution of the 22nd November, 1890 that the orders passed should be reversed and the Collector should be directed to hold fresh proceedings.

The Collector's decision dated the 30th August, 1893 is Exhibit 323. After setting out the issues for decision No. (1) what is the custom of service? No. (2) who are the representative *Vatandars*? the Collector proceeds:

"Before addressing myself to decide these issues I must dispose of the preliminary issue, 'are the Nadgirs or the *Jahagirdars*, *Vatandars*?' This question I am not competent to decide. I refer the parties to a Civil Court for its adjudication. No doubt the High Court's interlocutory decree (in a suit between one families alone of the Nadgirs and one family alone of the *Jahagirdars*) alluded to above, shows conclusively that the Nadgir family are *Vatandars* The decision raises a strong presumption that the *Jahagirdars* as a whole are non-*Vatandars*. But then I cannot leave the questions for the determination of the Civil Court.

Then he recorded that the offices of Patil and Kulkarni formed part of one and the same *Vatan*, and as the village was a large one, four officiators were required.

Nothing further appears to have been done until the 13th August, 1904, when the Commissioner S. D. wrote (Exhibit 321) to the Collector: "I have the honour to request that you will kindly hold proceedings on the hypothesis that neither side will have recourse to the Civil Court and submit the case with your opinion as to whether either of the two parties is entitled to the *Vatan* (including lands and right of service) and if so which."

The Collector referred the question to the District Deputy Collector for disposal and that officer on the 30th June, 1905 (Exhibit 319) sent to the Collector the proceedings he had held in the matter with a memorandum (Exhibit 320) which would serve as a report.

Mr. Moghe's opinion was that the Nadgirs, and not *Jahagirdars*, had the *Vatan* rights of service. In G. R. No. 1532 of 8th March, 1900 Government had accepted the opinion of the Commissioner S. D. that the decision of the High Court with regard to 22 *Mars* should be respected and so Govern-

ment on the basis of that decision might be asked to modify their orders passed on the recommendation of the Alienation Settlement Officer's letter of the 13th November, 1864, and to direct that the whole of the 200 *Mars* should be recogniz ed as Kadim. If that was done 80 *Mars* for Patil Vatan and 40 *Mars* for Kulkarni Vatan would be available for service. The Alienation Settlement Officer's letter alluded to was based on the Sanad produced by the *Jahagirdars* but that document had been found unreliable by the High Court.

As the High Court had held that the *Jahagirdars* had realised all their arrears of *judi* due on the 22 *Mars* while in their possession and that the Nadgirs were entitled to recover the land without payment, he suggested that the remaining *Mars* should be resumed by Government and regranted to the ousted family of Nadgirs.

The memorandum makes it clear that although, the Collector in 1893 said he was not competent to decide who were the *Vatandars*, he had recorded two notes which do not appear in Exhibit 323.

In the first he found that in his opinion the Nadgirs alone were *Vatandars*. Both divisions of the family should serve in future contemporaneously, if they were held to be *Vatandars*; the heads of families alone to serve *inter se* in turns. If the *Jahagirdars* were held to be *Vatandars* it would appear that the custom was for them to serve by deputy. In the other note he set out who would be the heads of the families according as the Nadgirs or the *Jahagirdars* were held to be *Vatandars*.

On Mr. Moghe's report the Collector passed an order on the 28th November, 1906, Exhibit 316. It is headed 'Proceedings held by the Collector of Dharwar for the formation of Hakdar Patraks of the Patilki (both revenue and police) and Kulkarni office *Vatan* of Kasba Hebli under Bombay Act III of 1874.' The order with regard to representative *Vatandars* as decided by Mr. Moghe, as entered in the two *Vatan* Registers, was admitted to be correct and directions were given as to how the services were to be taken.

On the 17th July, 1907, the Commissioner S. D. recorded his decision on appeal, Exhibit 315. The points for decision were (1) whether there was a *Vatan* still existing, (2) if so, who were the *Vatandars*, the *Jahagirdars* or the Nadgirs. The Commissioner found that there was originally a *Vatan* in the Nadgir family and that *Vatan* had never been conferred on the *Jahagirdars*. Accordingly he confirmed the Collector's decision in determining members of the Nadgir family to be representative *Vatandar*. But the entry of only so much of the *Vatan* land in the register as was thought necessary for the emolument of the officiators was altered and the whole of the *Vatan* lands was directed to be entered in the register as such, although it would not be necessary to take steps to recover for the *Vatan* from the *Jahagirdars* in possession any more than was required for the emolument of the officiators.

On the 4th June, 1908, the *Jahagirdars* petitioned Government that the order of the Collector, confirmed on appeal by the Commissioner S. D. might be cancelled. It was answered by G. R. 10129 of the 7th October, 1908 (Exhibit 318).

Government were of opinion (1) that the Collector could determine whether a particular individual was a *Vatandar* or not, where a finding on that point was necessary for finally deciding upon the right to officiate. His finding, however, was open to be revised and set aside by the Civil Courts; (2) that it was not a case in which the Collector could take action under Section 6 of the *Vatan* Act; (3) that the Collector's decision determining members of the Nadgir family to be representative *Vatandars* should be accepted. The *Jahagirdars*, if so advised, could file a suit in the Civil Court; (4) that the Commissioner's order that the whole of the Patilki and Kulkarniki *Vatan* lands shown in the Alienation Settlement Officer's letter of the 9th June, 1864, should be entered as such in the *Vatan* Register and that so much as was required for the emolument of the officiator should be recovered from the *Jahagirdars* in possession, should be upheld.

The learned Judge says that the *Vatan* Register was prepared in 1903, and refers to Exhibit 297 which is a copy of the *Vatan* Register kept in the Mamlatdar's Office. There is a note at the bottom as follows:

"The *Vatan* Register was framed by the Collector on 28th November, 1906, and was upheld by the Commissioner in

appeal on 17th July, 1907."

It is signed by the Mamlatdar and the date is 8th June, 1908. Apparently the Judge must have taken the date on which the Mamlatdar made his note as the date on which the *Vatan* Register was prepared, but this is an obvious error. It was not until the 12th April, 1913, that a contribution was levied against the *Jahagirdars* at the rate of Rs. 1-9 0 per Mar. The Judge concludes,

"I think these executive orders were passed under a complete misapprehension of the effect of the decision of the High Court reported in P. J. 1877, p. 47 and generally in ignorance of the legal position as it stood in 1884 when the inquiry was started. By that time the Nadgirs had been ousted by adverse possession from both the lands in the possession of the *Jahagirdars* and the offices of Kulkarni and Revenue Patil. As regards the effect of the Inam Commissioner's recommendation made in 1864 and recorded in Exhibit 471, I have come to a different conclusion from their Lordships because the evidence before me is more ample and proves that the Governor-in-Council upon that decision adjudicated upon the rights of the *Jahagirdars* and the Nadgirs *inter se* and that the Inam Commissioner's inquiry was carried on with the full knowledge of the Nadgirs and after giving them every opportunity of leading evidence and putting forward their claims."

I am now in a position to deal with the proceedings in Suit No. 83 of 1868 and R. A. No. 3 of 1876. The plaintiff Nadgir claimed that 22 *Mars* appertained to his *Vatan* in the village of Hebli of which 3¾ *Mars* were in his possession the remaining 18¼ being held in trust by the defendants *Jahagirdars* since 1832. The defendants replied that they were in possession of the land ever since the grant of the village in *Jahgir* to their ancestors.

The issues and the answers thereto were:—

(1) Is the land in dispute part of the *Vatan* property of the plaintiff? Answer —yes.

(2) Is it held in trust by the defendants? Answer—yes.

(3) Has the suit been properly valued? Answer—yes.

(4) Is the claim barred by lapse of time? Answer—No.

The trial Judge said on issues 1 and 2:

"The fact, that the plaintiff is the *Vatandar* Nadgir Patil and Kulkarni of Hebli, is not denied by the defendants. From the documents (numbered) it is conclusively proved that the land in dispute is *Vatan judi* land belonging to the plaintiff, that in consequence either of the plaintiff's minority or his inability to pay the *judi* due thereon it was taken charge of by the defendants or their ancestors for temporary management about 1832 and that the plaintiff is entitled to claim restoration."

It does not appear as if the defendant in the trial Court placed any reliance on Major Etheridge's recommendation of 1864.

In the judgment of the High Court on appeal the defendants' case is stated as being that the village was granted to their family in *Jahgir* in 1748 and that the *Vatan* of the Patil had previously been confiscated by the then Government, that the land so confiscated was included in the grant and had ever since been in the enjoyment of the defendants' family.

It being admitted by the plaintiff that the defendants were *Jahagirdars* and it being admitted by the defendants that the land in dispute originally formed the *Vatan* of the plaintiff's family and it being agreed between the parties that the land was in possession of the defendants because the plaintiff or his ancestors failed to pay the *judi*, the point in dispute was whether the plaintiff's rights had become absolutely forfeited or whether he could still re-assert these rights on certain conditions.

Very little reliance could be placed on the greater portions of the documentary evidence produced, but the plaintiff's case really rested upon two grounds: first, that the land in dispute had, ever since it had been in the defendant's possession, been entered in their account as 'Kamavishi' a term said to indicate temporary or provisional arrangement, and, secondly, that the late defendant Ramachandra, the natural father and adoptive uncle, had made certain admissions amounting to a recognition of the plaintiff's right. With regard to the *Sanad* of 1748 of which only a copy was produced, the judgment says:

"The *Sanad* appears to us to be of no real value. It is most probably a

forgery. If it be genuine it does not really dispose of the question in dispute. The word translated 'confiscated' is '*jupti*' or '*zupti*' which may mean temporarily attached and not absolutely confiscated."

What purports to be the original has now been produced by the *Jahagirdar* plaintiffs, but their case is no further advanced thereby than it was when the copy was produced more than forty years ago.

Then, after various other documents are considered, the judgment says:—

"The most that can be said is that the plaintiff's documents appear to be worth as much as those of the defendants. If reliance is to be placed upon them the conclusion to be arrived at is that between 1748, when the village is alleged to have been granted to the defendants' family and the year 1832 the land in dispute was some time in the possession of the Patils, but that at any rate whenever it was in the possession of the *Jahagirdars*, it was entered in the village accounts as 'Kamavishi,' etc. It seems very clear that land entered as 'Kamavishi,' is land which for some reason or other had come under the management of government or its assignee, for the purpose of collecting revenue but which has not been incorporated with the Khalsat land which is the absolute property of Government or its assignee. So long as such land continues to be entered in the accounts as 'Kamavishi' and to be distinguished from 'Khalsat' the inference fairly arises that some reservation of the rights of the former holders of the land must have been intended."

Then various other documents are dealt with, which appeared to support the plaintiff's case, including Exhibit 152, a statement made by the defendants' agent before the Inam Commissioner in 1855 to the effect that the land in dispute was entered as 'Kamavishi' though it was managed like Khalsat. On this the judgment says:—

"The Inam Commissioner in his report, Exhibit 3367 (*sic*), entered the land accordingly, not under the head of alienated land but as land of which the proceeds formed part of the *Jahagirdar's* income. This entry no doubt correctly described the existing state of facts and it is not clear that the Inam Commissioner arrived at the conclusion that the land was absolutely the property of the *Jahagirdars*. But even if such were his conclusions, the plaintiff is not bound by a decision made in an inquiry to which he was not a party and the object of which was simply to settle the respective rights of the Government and the *Jahagirdars*."

Evidently here the decision of 1858 is referred to and not the recommendation of the Alienation Settlement Officer in 1864. Though that document was exhibited it does not appear that any reliance was placed upon it or that the Court came to any conclusion as to its binding character as the learned Judge seems to think. If it was conclusive, it is difficult to imagine that the Court would have ignored it.

In those days the proceedings of the Inam Commissioner would be far more familiar to the Courts than they are now, and the proper inference to draw, in my opinion, is that it was realised that Major Etheridge's recommendation in Exhibit 471 had no bearing whatever to help the defendants' case, while it would seem very unsafe to suggest that the Court in this case has better materials before it on which it can come to a better conclusion as to its effect on the question at issue.

No doubt we are concerned in this case with the remaining 90 and odd *Mars*, but the entries in the village accounts showed that all the 200 *Mars* were entered as 'Kamavishi,' and therefore everything that was said by the Court in R. A. 3 of 1876 is applicable to the land in this case. But the learned Judge has held that before the Revenue officers began their inquiry in 1884 the *Jahagirdars* had acquired a title by their adverse possession not only to the Patilki and Kulkarniki *Vatan* but also to the offices of the Kulkarni and Revenue Patil, since, whatever the High Court may have held as to the suit land in the suit of 1868, the *Jahagirdars* in 1868 left off entering the *Vatan* land as 'Kamavishi.'

But assuming that the Nadgirs were entitled either by agreement or by custom to get back their *Vatan* lands on payment of *judi*, time would not begin to run against them until they were made aware that the *Jahagirdars* were setting up a title to hold the *Vatan* lands in their own right and there is no

evidence that the Nadgirs were aware of any alteration in the method of keeping the village accounts. Nor is it easy to see how the *Jahagirdars* could acquire the offices of Patil and Kulkarni by adverse possession. In any event the learned Judge has omitted to notice that the Nadgirs in 1875, petitioned the District Deputy Collector to prepare the *Vatan* Register of Hebli (see Exhibit 315) and to admit their rights to serve as Patils and Kulkarnis although no proceedings were held on that petition until 1884.

On the other hand it would appear as if the plaintiff's suit, except as regards the claim to recover the money paid to the defendant No. 1, was barred by limitation as the plaint was filed on the 16th July, 1913 and the Collector's order was passed on the 28th November, 1906 and the *Vatan* Register was framed on the same day. I have already pointed out that the learned Judge was in error in thinking that it was framed in 1908.

As the plaintiff cannot, therefore, now impugn the order passed in 1906 the contribution, levied in 1913 in consequence of that order, cannot be recovered. It may be noted that the plaint refers to the Commissioner's order of 1907 and not to the Collector's order of 1906 while the suit is filed just within six years of the Commissioner's order.

In my opinion the decision of the learned District Judge must be reversed. It was based on a wrong conclusion as to the binding effect of Major Etheridge's recommendations in 1864, and a wrong appreciation of the facts on which he found that the *Jahagirdars* had acquired a title to the lands and the offices by adverse possession.

The Appeal No. 132 of 1918, must be allowed and Appeals No. 157 and 159 of 1918, dismissed. The result will be that the plaintiff's suit is dismissed with costs in both Courts. One set of costs to defendant No. 1 and one to the other defendants Nos. 2 to 7. Defendant No. 13 must pay the costs of his appeal.

Shah, J.:—I agree.

Decree reversed.

A. I. R. 1922 Bombay 25.

SHAH AND PRATT, JJ.

Chikko Bhagwant Nadgir—Appellant

v.

Shidnath Mortand—Respondent.

L. P. Appeal No. 24 of 1921, decided on 25th November, 1921, from a decision of Macleod, C. J., in S. A. No. 40 of 1917, reported in A. I. R. 1922 Bom. 250.

Land Revenue Code (Bombay Act V of 1879), S. 83—Origin of tenancy though old, traceable —Section does not apply.

The provisions of Section 83 of the Bombay Land Revenue Code, 1879, do not apply to a tenancy though very old when its commencement can be traced to a specified year.

[P. 25, C. 1.]

K. H. Kelkar—for Appellant.

Nilkanth Atmaram—for Respondent.

Shah, J.:—This is an appeal under the Letters Patent from the judgment of the learned Chief Justice allowing the plaintiffs' claim for a declaration that the defendants were their annual tenants. It is not necessary to set forth the previous history of this case. It is enough to point out that in November 1919, the case was remanded for the purpose of determining the nature of the defendants' tenancy, as to which the plaintiffs had sought a declaration.

Both the lower Courts found that the tenancy commenced after the gift by the original owners in favour of the ancestors of the plaintiffs' predecessor-in-title. They applied the provisions of Section 83 of the Bombay Land Revenue Code and presumed that the tenancy was permanent, mainly relying on the observations in *Ramchandra Narayan Mantri* v. *Anant* (1).

When the second appeal came on for hearing, it was held that Section 83 of the Bombay Land Revenue Code did not apply as the commencement of the tenancy was traced, and that it could not be said, as required by Section 83, that by reason of the antiquity of the tenancy no satisfactory evidence of its commencement was forthcoming, having regard to the finding that the tenancy commenced after the gift in favour of the ancestors of the plaintiffs' predecessor-in-title in 1805.

The defendants, who have appealed from this judgment, have contended that Section 83 does apply to this case. Though the learned pleader has questioned the finding of fact that the gift in favour of Shantachary's ancestor was in 1805, and that the tenancy of the defendants commenced thereafter, I do not think that that contention could be allowed. Both the lower Courts have found that as a fact, and it is not shown, nor is it sug-

(1) (1893) 18 Bom. 433.

gested in the memorandum of appeal, that that finding is not supported by the evidence in the case.

For the purpose of the main argument, therefore, it must be accepted as a fact that the tenancy commenced in or after 1805. It is quite true, as found by the lower Courts, that thereafter the defendants have been in possession of the land on payment of a fixed sum of Rs. 8 either by way of assessment or rent. It is not possible, however, to apply the provisions of Section 83 of the Bombay Land Revenue Code, as the commencement of the tenancy is traced.

It seems to me that the view taken by the learned Chief Justice on this point is right, and the observations in *Ramachandra* v. *Anant* (1), must be taken to have been made with reference to the facts of that particular case, and cannot be so read as practically to modify the terms of the section.

In view, however, of the observations of the lower Courts in their judgments we adjourned the hearing of the appeal on the last occasion to have certain necessary documents translated in order to see whether apart from Section 83 there was anything in the case to show that the tenancy in favour of the defendants was of a permanent character. Having regard to the length of time for which they had been in possession on payment of a fixed sum, it seemed to us necessary in the interests of justice to see whether the plea of permanent tenancy might be otherwise made out. It must be said, however, with reference to this aspect of the case, that no such point was taken either before the learned Chief Justice when the second appeal was heard, nor is it taken in the memorandum of appeal now.

After having read the documents I am unable to hold that there is any real basis for the inference that the tenancy was of a permanent nature. Exhibit 76 is the most important document on this point. It has been read and discussed before us. I am satisfied that there is nothing in that document to support the inference that the tenancy was of a permanent nature. On the contrary it seems to me from the letter, the date of which cannot be ascertained, that Shantacharya, who was the father of the plaintiff's vendor, wrote to one of the defendants, representing the tenants, that it was not fair on his part merely to offer the assessment, but that he should hand over the land to him (Shantacharya), particularly when he or his ancestors had helped Shantacharya's ancestors in retaining the benefit of the gift which the other members of the Nadgir family had made in favour of Shantachary's ancestors. The letter, as I read it, shows that Shantacharya then appealed to the Nadgir tenant that it was proper for him to hand over possession of the land to him. This position becomes intelligible on the footing that the Nadgirs were not the permanent tenants of Shantacharya and that they were liable to restore possession to him.

On a consideration of this letter and other documents, to which we have been referred, I am satisfied that there is no sufficient basis for inferring that the defendants are permanent tenants. I would, therefore, dismiss the appeal with costs.

Pratt, J.:—I agree with the construction put upon Section 83 of the Bombay Land Revenue Code in the judgment of the learned Chief Justice and that the presumption under that section is not available to the tenants in this case. I agree also that the further documents which we have had translated for the purposes of this appeal do not disclose evidence that the tenancy was, as a matter of fact, a permanent tenancy. Shantacharya's letter, Exhibit 76, shows that he originally derived title to the land in suit from the ancestors of the present defendants. Shantacharya's title was attacked by one Ittaji Subappa, and the defendants' ancestors assisted Shantacharya in repelling that attack by suit.

The defendant's case is that as a reward for that assistance they were granted the tenancy of the land in suit. That is probably true. But the letter Exhibit 76 does not show that that tenancy was a permanent tenancy. *Per contra* in that letter Shantacharya seems to be protesting against defendants retaining the tenancy.

However they did remain in possession as tenants; and the further documents, *i.e.*, the rent receipt in 1899, Exhibit 79 and the notice, Exhibit 28, in 1901, go no further than to establish, what is in fact admitted, that the defendants had, as a matter of fact, paid rent at an unvarying rate of Rs. 8 per

annum ever since they got their tenancy. But it cannot be inferred from that that the tenancy is not annual. Therefore I agree that this appeal should be dismissed with costs. *Appeal dismissed.*

A. I. R. 1922 Bombay 27 (1).

MACLEOD, C. J. AND SHAH, J.

Ekoba Parashram and others—Defendants-Appellants. v.

Kashiram Totaram—Plaintiffs-Respondents.

Second Appeal No. 153 of 1921, decided on 28th November, 1921, from a decision of Asst. Judge, Khandesh in Appeal No. 586 of 1918.

Hindu Law—Succession—Preferential heir—Consanguine brother preferred to uterine brother—The word "Sodara" used in the Mitakshara, does not mean uterine brothers.

Hindu Law contemplated generally no competition between consanguine and uterine brothers, though it propounds settlement of rights between full and consanguine brothers. Under the Hindu Law a consanguine brother is entitled to succeed in preference to a uterine brother. The word 'Sodara' used in the Mitakshara is not indicative of the brothers born of the same mother, but of different fathers. In the Mitakshara, Chapter II, Section IV, paragraphs 5 and 6 (Stokes' Hindu Law Book, page 445) where the subject of the brothers' right to inheritance is dealt with, nothing beyond the difference between brothers of the whole blood and brothers of the half blood is indicated. The brothers there referred to are all sons of the same father.

For the purpose of inheritance sons of the same father or brothers; and there is a distinction made between sons by different mothers. But the sons of the same mother by different fathers though born of the same womb belong to a different family and as such are entirely outside the category of the class of heirs under the heading of "brothers"

Coyajee and *V. B. Virkar*, (*for P. V. Nijsure*)—for Appellants.

Patwardhan with *D. C. Virkar*—for Respondent No. 4.

Shah, J.:—In this appeal we are concerned with the property of Jairam. He was the son of Ramji by his first wife Sadi. Ramji re-married and had a son Totaram by his second wife who also was named Sadi. Totaram is the plaintiff and claims the property of Jairam as his heir. The first wife of Ramji was divorced by him and she re-married one Parsharam; she had two sons by her second husband. The defendant No. 1 is one of these sons and the other defendants are the sons of the other son. They claim the property of Jairam as representing the brothers of Jairam born of the same mother. It seems to me clear on these facts that according to Hindu law the sons of Parashram belong to a different *gotra* altogether, and can have no claim as brothers to the property of Jairam, in preference to the claim of the plaintiff, who is admittedly the half brother of Jairam.

The lower Courts have rightly disallowed their contention. Before us a feeble attempt has been made to suggest that the word सोदर (sodara) used in the Mitakshara is indicative of the brothers born of the same mother, though not the same father, I do not think that in the Mitakshara, Chapter II, Section IV, paragraphs 5 and 6 (Stokes' Hindu Law Books, page 445) where the subject of the brother's right to inheritance is dealt with, anything beyond the difference between brothers of the whole blood and brothers of the half blood is indicated. The brothers there referred to are all sons of the same father.

The contention of the appellants seems to me to be opposed to the basic principles of Hindu Law as to inheritance, and there is no provision in the Mitakshara or elsewhere for treating the sons, born of the same mother after her re-marriage, being treated as brothers born of the same womb for the purpose of inheritance so as to be included in the meaning of the word भ्रातरः (bhratarah) used in the texts.

For the purpose of inheritance sons of the same father are brothers and there is a distinction made between sons by different mothers. But the sons of the same mother by a different father though born of the same womb belong to a different family and as such are entirely outside the category of the class of heirs under the heading of brothers. It is not so much the meaning of the word सोदर as the context, coupled with the basic principles of Hindu law, that is against the defendants' contention.

I have no hesitation whatever in holding that the view taken by the lower Courts is correct. The appeal must therefore be dismissed with costs.

Macleod, C. J.:—I agree.

Appeal dismissed.

A.I.R. 1922 Bombay 27 (2).

MACLEOD, C. J. AND SHAH, J.

Mahadevappa Dundappa Hampiholi—Plaintiff-Appellant v.

Bhima Doddappa Maled—Defendant-Respondent.

Second Appeal No. 138 of 1921, decided on 28th November, 1921, from a decision of Asst. Judge, Belgaum, in Appeal No. 90 of 1920.

Civil Procedure Code (Act V of 1908), O. XXI, R. 95—Decree for possession and symbolical possession would interrupt adverse possession—Adverse possession.

Where the plaintiff got a decree for possession in 1914, against the defendants and got delivery of symbolical possession in execution.

Held, that the decree would put a stop to any adverse possession prior to the date of the decree, and that even otherwise symbolical possession is sufficient to interrupt adverse possession where the person setting up adverse possession was a party to the execution proceedings in which the symbolical possession was given. (36 Bom. 373) Doubted. (20 Bom. L. R. 502), (P. C.), followed.

[P. 28, C. 2.]

D. R. Manerikar—for Appellant.

G. R. Madbhavi—for Respondent No. 1.

Macleod, C. J.:—The plaintiff filed this suit for possession and mesne profits. The trial Court dismissed the suit and an appeal from that decree was dismissed with costs. The question is whether the defendants could succeed against the plaintiff who had obtained a decree for possession on the 28th February, 1914. It was alleged that in execution of that decree the plaintiff was put in possession on the 5th February, 1915. The learned Judge says "the main question, as was frankly stated by the learned pleader, is whether the possession delivered on the 5th February, 1915, was symbolical possession or real possession," and the learned Judge came to the conclusion that the possession was only symbolical.

In *Mahadeo Sakharam* v. *Janu Namji* (1), it was decided by a Full Bench that merely formal possession of immoveable property by a purchaser at a Court sale cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession, and the property is not in the occupancy of a tenant or other persons, entitled to occupy the same.

Symbolical possession is not real possession, nor is it equivalent to real possession under the Civil Procedure Code except where the Code expressly or by implication provides that it shall have that effect.

But in *Radha Krishna* v. *Ram Bahadur* (2), it was decided by the Privy Council that symbolical possession is sufficient to interrupt adverse possession where the person setting up adverse possession was a party to the execution proceedings in which the symbolical possession was given. Their Lordships approved of the decision in *Juggobundhu Mukerji* v. *Ram Chunder Bysack* (3). This decision of the Privy Council appears to throw considerable doubt on the decision of this Court in *Mahadeo Sakharam* v. *Janu Namji* (1), which may have, when the occasion arises, to be reconsidered.

In my opinion, in this case it cannot be said that the question of adverse possession arises in the face of the plaintiff's decree of February 1914. That would put a stop to any adverse possession prior to the date of the decree, and even if that were not so, considering that the defendants were parties to the execution proceedings, the decision in *Radha Krishna* v. *Ram Bahadur* (2), would be applicable. The plaintiff, therefore, would be entitled to succeed, and the appeal must be allowed and a decree passed for possession with costs throughout.

There will have to be an inquiry with regard to mesne profits for the past three years before suit and also with regard to future mesne profits.

Shah, J.:—I agree.

Appeal allowed.

(1) (1912) 36 Bom. 373=14 I. C. 447=14 Bom. L. R. 115 (F. B.).

(2) (1918) 20 Bom. L. R. 502=43 I. C. 268=34 M. L. J. 97 (P.C.).

(3) (1880) 5 Cal. 584=5 C. L. R. 548.

A. I. R. 1922 Bombay 28.

MACLEOD, C. J. AND SHAH, J.

Lakshimibhai Narayan Rango—Appellant v.

Narbadabai Rango—Respondent.

First Appeal No. 106 of 1921, decided on 28th November, 1921, from a decision of the First Class S. J., Jalgaon, in Suit No. 459 of 1920.

Hindu Law—Widow and mother—Residence in family house—Mother should not be asked to reside elsewhere except in cases of disagreement between them.

Where a Hindu widow was owner of a family dwelling house subject to a right of residence of her mother-in-law, and disputes arose between them,

Held, that the mother-in-law should be allowed to reside in the same family house, although another house belonging to the family was available for her residence but liberty was given to the widow to apply again, so that in future, if the family disagreements became so acute that it really would not be desirable that the widow and her mother-in-law should be living under the same roof, it should be possible for the widow to come to the Court and ask that residence should be provided for her mother in-law elsewhere. The order was rather unusual but one warranted by the circumstances of the case. [P. 29, C. 1.]

D. C. Virkar—for Appellant.

D. H. Kelkar—for Respondents.

Macleod, C J. :—The question in this appeal relates to a dispute between the plaintiff, who is the widow and heir of one Narayan, and the 1st defendant who is the mother of Narayan. The Judge has declared that the plaintiff is the owner of the house described in the plaint, but subject to defendant No. 1's right to reside in a portion of it suitable and sufficient for her residence. The plaintiff appealed on the ground that the order directing residence to be provided in the suit house for her mother-in-law was most inconvenient and prejudicial to the interest of the plaintiff.

But the fact remains that this was a family house which was occupied by Narayan, and naturally his widow would be very reluctant to leave the house in which ordinarily she would have a right to reside according to Hindu law, although another house belonging to Narayan might be available for her residence.

It seems that the relations between the plaintiff and her mother-in-law have become somewhat unfriendly and therefore, while dismissing the appeal, we give the plaintiff liberty to apply, so that in future if the family disagreements become so acute that it really would not be desirable that the plaintiff and her mother-in-law should be living under the same roof, it will be possible for the plaintiff to come to the Court and ask that residence should be provided elsewhere for her mother-in-law.

The order is rather unusual, but it is one which is warranted by the circumstances of the case. Otherwise the plaintiff might be obliged to file a suit hereafter and it might be argued that the matter is *res judicata* and on the other hand the result of giving the plaintiff liberty to apply will necessitate a considerable amount of caution on the part of the 1st defendant who will feel that her residence in the suit house would depend on her living in agreement with the plaintiff, or at any rate in not providing any occasion for acute disputes arising.

The appellant will pay costs out of the estate.

Order accordingly.

A. I. R. 1922 Bombay 29.

MACLEOD, C. J. AND SHAH, J.

Dola Khetaji Vahivatdar—Defendant-Appellant

v.

Balya Kanoo Patel— Plaintiff-Respondent.

Second Appeal No. 248 of 1921, decided on 29th November, 1921, from a decision of Dist. Judge of Thana, in Appeal No. 134 of 1919.

Civil Procedure Code (Act V of 1908), S. 11, Explanation 4—First suit under the Deccan Agriculturists' Relief Act (XVII of 1879), S. 10 A, for a declaration that a sale was in reality a mortgage—Second suit for specific performance of an agreement to re-sell is not barred.

The plaintiff sold the suit property to the defendant in 1906, and the defendant executed in his favour a "Satekhat" to re-sell the property to him at any time within twelve years. In 1911 the plaintiff filed a suit claiming to redeem the property alleging that the sale of 1906 was in reality a mortgage, and seeking the protection afforded by Section 10 of the Deccan Agriculturists' Relief Act. The suit failed. Subsequently the plaintiff sued for specific performance of the "Satekhat."

Held, that the second suit was not barred by *res judicata*. It was not incumbent on the plaintiff to sue in the alternative for specific performance in his redemption suit and therefore it was not necessary to determine in this suit whether he could have done so. The two suits were mutually inconsistent and if the plaintiff failed in proving the mortgage, he still had a number of years left, under the 'Satekhat,' within which we could have sued to get back the property on payment of the consideration mentioned in the 'Satekhat.' [P. 30, C. 1.]

G. S. Rao—for Appellant.

W. B. Pradhan—for Respondent.

Macleod, C. J.:—'The plaintiff sold

the suit property to the defendant on the 16th March, 1906, continuing to remain in possession as tenant. On the 13th August, 1906, the defendant executed in his favour a *satekhat* to sell the property to him at any time within twelve years for Rs. 395, Rs. 5 being paid as earnest money. The plaintiff filed suit in 1911 claiming to redeem the property on the ground that the document of the 16th March, was a mortgage, seeking the protection afforded by Section 10-A of the Dekkhan Agriculturists' Relief Act. That suit was dismissed.

Before twelve years had expired, the plaintiff sued again to recover the property on payment of Rs. 395. It was contended that that question was *res judicata* as the plaintiff might in his original suit of 1911 have sued in the alternative for specific performance of the *satekhat*. Whether, he could have sued in the alternative for specific performance in his redemption suit, need not be determined. It certainly cannot be said that he ought to have done so.

The two suits were mutually inconsistent and if the plaintiff failed in proving the mortgage, he still had a number of years left under the *satekhat* within which he could have sued to get back the property on payment of the consideration mentioned in the *satekhat*.

We think, therefore, the decision of the lower appellate Court is right and the appeal must be dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 30.

MACLEOD, C. J. AND SHAH, J.

Mahadev Ganesh Jamsandekar—Plaintiff-Appellant v.

Secretary of State for India—Defendant-Respondent.

First Appeal No. 222 of 1920, decided on 6th December, 1921, from a decision of District Judge, Ratnagiri, in Civil Suit No. 2 of 1916.

Sea Customs Act (VIII of 1878), Ss. 182 and 187, Cl. (3)—Confiscation and penalties, adjudication of need not be on legal principles and where no injustice done, will not be interfered with.

The Sea Customs Act contains no provisions with regard to the adjudication of confiscation and penalties which can be made by the Customs Officer under Section 182. Therefore, the Customs Officers must proceed according to general principles, which are not necessarily legal principles, for the purpose of arriving at a conclusion when such inquiries, as the present one, are instituted.

A. G. Desai—for Appellant.

S. S. Patkar, Government Pleader—for Respondent.

Macleod, C. J.:—The plaintiffs are the sons of one Ganesh Mahadev Jamsandekar, an inhabitant of Malvan, in whose house certain silver ingots were discovered by the Police. The silver was attached and sent over to a clerk in the Customs Department. It was suspected that silver was being imported into British India without paying duty, and accordingly an inquiry was instituted and a report was made to the Collector of Customs. The Collector, on considering all the papers which were sent to him, came to the conclusion that the silver had been imported without paying the duty, being illicitly landed at Dandi from Goanese territory. Ganesh was, therefore, found guilty of an offence punishable under Clause (3) of Section 167 of the Sea Customs Act (VIII of 1878) and was fined Rs. 1,000, while the silver was confiscated.

A suit was brought by Ganesh for a declaration that the orders passed by the Collector of Customs were illegal, and to recover the value of the silver and the amount of the fine. The plaintiff's suit was dismissed by the District Judge of Ratnagiri on the ground that he had no jurisdiction to hear the suit. The decision was set aside by this Court: see *Ganesh Mahadev* v. *The Secretary of State for India* (1). The Court said (page 232):

"The real question, therefore, to be determined in this litigation is whether there has or has not been a legal adjudication in accordance with the provisions of the Act. That will involve determining, after evidence has been recorded what was the exact method adopted for the purpose of the adjudication and whether that method was in accordance with the express or implied provisions of the Act."

The suit was, therefore, remanded.

No further evidence was called by either side. On behalf of the defendant's papers relating to the proceedings before the Customs Officers, Exhibits, A-1 to 7, were put in. It is admitted that the Sea Customs Act contains no provisions with regard to the adjudication of confiscation and penalties which can be made by the Customs Officers under Section 182. Therefore, the Customs Officers must proceed according to general principles, which are not necessarily legal principles, for the purpose of

(1) (1919) 43 Bom. 221=49 I.C. 427=21 Bom. L.R. 27.

arriving at a conclusion when such inquiries, as the present one, are instituted.

It appears to me, after perusing the papers, which were before the Collector of Customs, and which I presume were taken in accordance with the ordinary procedure, that various statements were recorded by the Sarkarkun, including the statement of Ganesh. There is also a long application on behalf of Ganesh which has been placed before us, but which does not appear in the paper book, and I have no doubt that the Collector, who is not bound to adjudge on confiscation and penalty, as if the matter was proceeding in a Court of law according to the provisions of the Civil or Criminal Procedure Code, dealt with the various statements before him in a careful and judicial manner.

The learned Judge has referred to the case of the *Local Government Board* v. *Arlidge* (2), in which the Court said: "that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation;" and again in the *Board of Education* v. *Rice* (3), the Court said: "They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

It is obvious from the record in this case that the plaintiff had ample opportunity to correct or contradict any statement prejudicial to his view which had been recorded. I have before me a petition, signed by the pleader of Ganesh Mahadev, in which all the points that are placed now before us were entered.

If, it in any way appeared to me that there has been real injustice in this case, I would not hesitate to entertain the appellant's claim. But as far as I can see from the provisions of the Sea Customs Act, the appellants have no reason to complain that justice has not been dealt out to Mahadev by the Customs Authorities. Even dealing with the case on the merits, it seems to me absolutely certain that the story put forward by Ganesh with regard to the carriage of this silver from Bombay *via* Belgaum to Malvan was rightly taken to be a false one.

In my opinion, therefore, in this case there has been an adjudication under the Act with which no fault can be found. Therefore the appeal must be dismissed with costs.

Shah, J.:—I agree.

Appeal dismissed.

(2) (1915) A.C. 120=111 L.T. 905=84 L J.K.B. 72=79 J P. 97=30 T.L.R. 672.

(3) (1911) A.C. 179=104 L.T. 689=80 L.J.K.B. 796=75 J.P. 393.

A. I. R. 1922 Bombay 31.

MACLEOD, C. J. SHAH AND FAWCETT, JJ.

Dattatraya Govindseth Lubri—Appellant

v.

Purshottam Narayanseth Dali—Opposite-party.

Civil Extra Ordinary Application No. 111 of 1921, decided on 10th October, 1921, from an order of the First Class S.J., Ratnagiri, in Darkhast No. 243 of 1920.

Civil P. C. (Act V of 1908), S. 73—Rateable distribution—Court cannot go behind decree—Plea that the decree is obtained by fraud—Opponent's remedy is under S. 73 (2).

The Court distributing assets under Section 73, cannot have greater power to go behind the decree, and should not deal with the question whether the decree is fraudulent. The remedy of the opponent raising the plea of fraud lies under Section 73 (2). [P. 32, C. 1.]

K. N. Koyajee—for Appellant.

P. B. Shingne—for Opponent.

Macleod, C. J.:—This is an application to this Court under Section 115 of the Code of Civil Procedure. The applicant obtained a decree against his debtor, presented a *Darkhast* for execution, and applied therein for rateable distribution of the proceeds of a sale in execution of another decree obtained by the opponent against the same judgment-debtor.

The opponent raised a plea that the applicant's decree had been obtained by fraud. The lower Court considered this question and being bound by the decision in *Chhaganlal* v. *Fazarali* (1), decided that the Court could decide the qustion of fraud in execution proceedings, where, the rival decree-holder raised the point notwithstanding that a concurrent remedy by a regular suit was left open to him. It is necessary, therefore, to consider the ruling in *Chhaganlal* v. *Fazarali* (1), Sir Charles Sargent, C. J. said:—

"The question referred to us is not without difficulty, but we are disposed to adopt the ruling of the Calcutta High Court *In re Sunder Dass* (2), that the Court distributing the proceeds of the execution under Section 295 of the Civil Pro-

(1) (1889) 13 Bom. 154.

(2) (1895) 11 Cal. 42.

cedure Code (Act XIV of 1882) should inquire into the *bona fides* of the decree-holders if called in question and decide it in the same manner as all other questions that arise in execution."

This question arose in *Sarvana Pillai* v. *Arunachalam Chettiar* (3). The learned Judges after considering the Calcutta case and also the decision of *Chhaganlal* v. *Fazarali* (1) came to the conclusion that it was not open to a Court exercising its duties under Section 73 of the Code of 1908 to inquire into the legality or validity of a decree brought to its notice in distributing the assets.

Our attention has been drawn by Mr. Koyajee to Section 272 in the Code of 1859 which says:—

"If it shall appear to the Court, upon the application of a decree-holder, that any other decree under which property has been attached has been obtained by fraud or other improper means, the Court may order that the applicant shall be satisfied out of the proceeds of the property attached, so far as the same may suffice for the purpose, if such other decree be a decree of that Court, or if it be a decree of another Court, may stay the proceedings to enable the applicant to obtain a similar order from the Court by which the decree was made."

Therefore under that Code the Court which was distributing the assets amongst the decree-holders had the power to deal with the question whether any of the decrees passed by itself had been obtained by fraud or other improper means. But this power was not given by Section 295 of Act XIV of 1882 nor by Section 73 of the present Code. Section 73 directs that the assets, after deducting the costs of realization, shall be rateably distributed among all such persons as shall have made applications to the Court for the execution of decrees for the payment of money passed against the same judgment debtor.

On general principles, the Court, which would be merely a distributing agency, would not have any power to deal with the question whether any of the decrees had been obtained by fraud or other improper means just as in an ordinary case of execution the Court which executes the decree cannot go behind the decree. So it would appear that where the Court is only concerned with distributing assets under Section 73, it cannot have any greater power to go behind the decrees which are presented by the various decree-holders asking for rateable distribution.

Sub-Section 2 of Section 73 expressly provides that where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets on the ground that such share of the distribution was obtained by fraud or collusion. No doubt, if any such suggestion is made to the distributing Court the applicant making it would be given an opportunity of filing a regular suit to set aside the decree, which, he alleges, had been obtained improperly, and the distribution might be stayed till that suit was decided. But that would be a matter purely for the distributing Court to decide, because sub-Section (2) implies that in spite of an objection the assets have been distributed, in which case the suit would be one for the refund of the amount distributed, on the ground that the person who obtained such amount had got a decree passed in his favour either by fraud or other improper means.

I think, therefore, the decision in *Chhaganlal* v. *Fazarali* (1) must be overruled. The rule must be made absolute and the distribution must proceed in the lower Court in the light of this judgment.

Costs to be costs in the execution in the lower Court.

Shah, J.:—I agree.

Fawcett, J.:—I agree.

Rule made absolute.

(3) (1917) 40 M 841=38 I. C. 117=32 M.L.J. 553.

A. I. R. 1922 Bombay 32.

MACLEOD, C. J. AND SHAH, J.

Bhai Gulab—Plaintiff-Appellant

v.

Jivanlal Harilal—Defendant-Respondent.

O. C. J. Appeal No. 27 of 1921, decided on 13th October, 1921, from judgment of Kajiji, J.

Hindu Law—Anuloma *marriage between a vaishaya male and an illegitimate girl of a vaishya, born of a Sudra woman is valid.*

The marriage between a Vaishya and sudra not being prohibited by Hindu Law, the *anuloma* marriage of Vaishya male with an illegitimate girl of a Vaishya, born of Sudra woman, is valid. Marriage out of practice or obsolete is not necessarily pro-

hibited by Hindu Law.

[P. 38, Cs. 1, 2.]

Munshi with *M. V. Desai*—for Appellant.

Jinnah and *Taraporevalla*—for Respondent.

Shah, J.:—This is an appeal from the judgment of Mr. Justice Kajiji in a suit filed by one Bai Nandubai, as the next friend of the minor Bai Gulab, for a declaration that the marriage of the minor with the defendant was null and void and for certain other reliefs.

The defendant is a Visa Modh Bania of Ahmedabad living in Bombay. The next friend of the minor is a Luhana by caste and the minor, whose caste is a point in dispute between the parties, lived under the care of Bai Nandubai at the time of the marriage.

The plaintiff filed the suit alleging that the marriage between the minor and the defendant was the result of fraud, that the minor girl was a Sudra and that the marriage was invalid. A sum of Rs. 10,000 was claimed as damages.

The defendant pleaded that the girl was the daughter of a Bania named Jagjivandas, that the marriage was properly and openly performed as a marriage would be performed among Banias according to Hindu rites, that the girl was in fact a Bania girl and not a "Sudra." He repudiated the allegations as to fraud and damages and made a counter-claim for the restitution of conjugal rights as the husband of the minor girl.

Several issues were raised, but at the hearing, issues Nos. 4 and 7, relating to the fraudulent character of the marriage ceremony and the claim for damages were abandoned.

It was admitted before the trial Court that the marriage ceremony was performed and that consummation had taken place. It was also admitted that the minor girl was born of the connection between Jagjivandas and one Durgabai, a Maratha woman, and that Durgabai was not married to Jagjivandas.

On a consideration of the evidence the learned trial Judge held that the girl was a 'Sudra' but was accepted as a Bania girl at the time of the marriage as she lived with Jagjivandas, who looked after her practically as his daughter until she went to live with Dhangavri, the legitimate daughter of Jagjivandas who put her in charge of Nandubai. The learned Judge found that the marriage was valid as she was practically recognised as a Bania girl at the time. Certain other improper suggestions made by the plaintiff in the course of the hearing were found on the evidence, to be unfounded and accordingly a decree was passed disallowing the plaintiff's claim and allowing the defendant's counter-claim.

In the appeal before us it is urged that the marriage is invalid, as the girl is, in fact, a Sudra girl, that the circumstance that the girl was recognised as a Bania girl by the caste people cannot make the marriage valid, if it be otherwise invalid, and that according to the Hindu law a marriage between a Vaishya male and a Sudra female is invalid.

As regards the caste of the girl, on the facts admitted in these proceedings, it is clear that her mother was a Maratha woman and her father is a Visa Modh Bania. It appears from the evidence that she was brought up by the father as a Bania girl. In the Birth Register the caste is described as Wani and the names of the parents are mentioned. It appears from Gulab's evidence that her mother died when she was about two years old, and apparently she lived as a Bania girl with her father. A few months before the marriage in question, which took place in December 1919, the girl was sent away to Dhangavri, the daughter of Jagjivandas. Then Nandubai, who was a neighbour of Dhangavri, came to have charge of the girl, and the marriage in question was arranged apparently by Nandubai with the defendant.

Though there is no evidence on the point, under the circumstances it is not unlikely that at least in the beginning Nandubai was acting with the knowledge and acquiescence of Dhangavri, and perhaps of the father of the girl, and it is also not unlikely under the circumstances that the parties concerned might have been aware of the parentage of the girl. However that may be, apparently the marriage was brought about on the footing that she was a Bania girl. As a fact, however, her parentage is known now, and the question arises whether she was a Sudra or occupied any better status.

The lower Court has recorded the finding that she was a Sudra, but has found that her caste is a matter of doubt

according to law and that, as she was treated as a Bania girl for the purpose of the marriage, she must be treated as a Bania girl. It is also urged on behalf of the defendant-respondent that, according to Hindu law, as stated in *Brindavana* v. *Radhamani* (1), the caste of the girl would be higher than that of the mother and lower than that of the father and reliance is placed upon Manu, Chapter X, Verse 41 and Yajnavalkya, Verses 91, 92, 95 and 96 of the Yajnavalkya Smriti, Acharadhyaya with Vijnaneshwara's commentary thereon, as supporting the view that the girl in the present case cannot be treated as a Sudra.

Apart from the decision in *Brindavana* v. *Radhamani* (1), the difficulty in the way of accepting this argument is that where the *anulomajas* are referred to they are referred to as born of the wedded wife of a lower class: and where the *pratilomajas* are described there is no reference to the lawful wedlock. We are not concerned here with the *pratilomajas* but in the case of *anulomajas* Yajnavalkya and Vijnaneshwara refer to those born of a wife, though she may be of a different class. The word used is *vinna* (विन्ना), which indicates a married state and not any irregular connection. It is true no doubt that in *Brindavana's case* (1), the learned Judges held that a son born of a Kshatriya male and Sudra female, though not married, was higher in caste than a Sudra. In fact they applied the principle applicable to the case of an illegitimate son. They observe at p. 85 of the report as follows:—

"Though the illegitimate children of members of the regenerate classes are excluded from inheritance by the author of the Mitakshara they are substantially recognised by him as members of their father's families for purposes of maintenance, and the absence of legal marriage is, in our judgment, no bar to the determination of their caste with reference to the law applied to the *anulomajas*, the point in analogy being the conventional notion in regard to the superior efficacy of the seed."

If the learned Judges in Madras were prepared to go so far on the strength of these texts, I am unable to discover any serious difficulty in applying the same rule in this Presidency. Of course, if this rule be applied, Bai Gulab would not be a Sudra. In view of the difficulty of applying these texts in their entirety, on account of the mixed marriages being very uncommon, the absence of any precedent in this Presidency on this point and the special feature of the caste system on this side of India, I prefer to leave this question open, and to deal with the case on the footing that the girl is a 'Sudra.'

The fact that the caste people of her father, who is a Visa Modh Bania of Surat, raised no objection to her father treating her as a Bania girl before the marriage, and that the marriage was celebrated as though she were a Bania girl without any objection on the part of the caste at Ahmedabad, to which the defendant belongs, does not appear to my mind to afford a sufficiently firm basis for the view that the marriage is valid, even though, otherwise it may not be valid.

It is urged for the defendant that as the caste people of the defendant have raised no objection to the marriage and are not shown to be likely to do so, the marriage must be accepted as valid. No doubt where there is any plea of special custom or usage, the attitude of the caste people would be very relevant as bearing on the existence of such a custom.

But it is very doubtful to my mind whether the validity of a marriage can be determined solely with reference to the position which the caste people may take up with regard to it. Their power to deal with the matter socially whenever they find any departure from the usual practice of marriage within their own circle, is undefined and practically unlimited.

But this Court has not recognised the power of the caste to decide questions as to the legal validity of a particular marriage. That must be decided ultimately with reference to the provisions of law subject, of course, to the proof of any special usage having the force of law. For instance in *Reg* v. *Karsan Goja* (2), and *Reg* v. *Sambhu Raghu* (3), the Court refused to recognise the interference of the caste as having any effect on the question whether the particular marriage was void or not. These rulings have no direct application here, but the

(1) (1889) 12 M. 72.

(2) 2 B. H. C. R. 117.
(3) (1877) 1 Bom. 347.

principle underlying them is capable of application to this case; and even apart from these decisions on principle the position is clear to my mind.

The question, therefore, that arises for decision is whether, according to the Hindu law, the marriage between a Vaishya (in this case a Visa Modha Bania of Ahmedabad) and the illegitimate daughter of a Vaishya (in this case a Visa Modha Bania) born of a 'Sudra' (in this case a Maratha woman) is valid. It is valid if according to law the marriage between a Vaishya and Sudra is not prohibited by law. If it is prohibited, it would be invalid. The *pratiloma* marriages have been, held to be invalid in this Presidency. In *Bai Lakshmi* v. *Kaliansing* (4), a marriage between a Brahmin girl and a Rajput male was set aside. In *Bai Kashi* v. *Jamnadas* (5), it was held that a Brahmin woman cannot contract a valid marriage with a 'Sudra.'

Mr. Justice Chandavarkar has discussed the various texts bearing on this question and the judgment is very helpful in deciding the question now under consideration. Both these were decisions relating to *pratiloma* marriages. But there is no decision of this Court, so far as I am aware, and none has been cited to show that *anuloma* marriages also are invalid.

It is clear that where there is a marriage in fact, there is a presumption in favour of there being a marriage in law: *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (6). The argument on behalf of the appellant has been that mixed caste marriages even of *anuloma* nature are not only obsolete but are prohibited by the Hindu law. This is a point of great importance and it is desirable to deal with it in some detail.

It is important to remember at the outset that what is out of practice or obsolete is not necessarily prohibited, and the argument is based upon the assumption that what is obsolete is prohibited by law. The importance of the difference between the two positions will be clear when I refer to the texts bearing on this point.

In the first place, we have the texts of Manu (Chap. III, Verses 12 and 13) which point out that while for the first marriage of twice-born men (wives) of the same class are recommended, the *anuloma* marriages are permissible: *see* Sacred Books of the East, Vol. XXV, pp. 77 and 78. The following Verses, Nos. 14 and 19, express disapproval of marriages of higher classes with Sudra women. But where, first there is a provision for such marriages and next any strong disapproval thereof is expressed, the fair meaning is that such marriages are disapproved but option is given and they are not prohibited.

That is the meaning which a commentator like Medhathithi has put upon them; and Kulluka Bhatta has interpreted them to mean that the prohibition is to be understood as limited to *pratiloma* marriages and not to be extended to *anuloma* marriages.

Mr. Justice Chandavarkar has referred to these views in *Bai Kashi's case* (5), at pp. 551, 552 of the report, and it is clear that so far as Manu is concerned no prohibition of *anuloma* marriages can be inferred.

I shall now refer to the verses in the Yajnavalkya Smriti and Vijnaneshvara's commentary thereon, bearing on the point, as the position is very clearly stated there. In the third Chapter of Acharadhyaya which relates to 'marriages' Yajnavalkya first lays down rules as to the selection of the bride and of the bridegroom, some of which are mandatory and others clearly recommendatory only. It is not necessary to refer to them in detail. Thereafter he proceeds to lay down the rules as to intercaste-marriages in Verses 56 and 57. It will be convenient to quote here the translation of these Verses as well as of Vijnaneshvara's commentary thereon given in the Translation of Acharadhyaya by Srisachandra Vidyarnava (published by the Panini Office, Bhuvaneshwari Ashrama, Allahabad, in 1918) at pp. 120, 121, 122, 128 and 129:—

"Marriages are of three kinds, as they are either for the sake of enjoyment, or for the sake of a son, or for the sake of Dharma (religion). Among these, the marriage for the sake of a son is of two kinds, necessary (Nitya) and optional (Kamya). In the necessary (Nitya) marriage for the sake of a son from the text "the bridegroom must be of the same class and learned," it is shown that the wife of the same class is the principal.

Now the author mentions an optional rule with regard to Kamya marriages

(4) (1900) 2 Bom. L. R. 128.
(5) (1912) 14 Bom. L R. 547=16 I.C. 133.
(6) (1870) 13 M.I.A. 141=3 B.L R 1=2 Suther. 267=2 Sar. 498 (P.C).

(In Kamya marriages, a man may marry a girl of the same caste, as in the Nitya marriage, or of lower caste). This is on the strength of the maxim, that an option may be allowed in the cases of the Kamya in relation to a Nitya form of any ceremony."

YAJNAVALKYA.

LVI.—Though it has been said that a twice-born may take a wife from a Sudra family, yet that is not my opinion, because out of her, he is born himself.—56.

Though it has been said:—"but for those who through desire proceed (to marry again) the following females (chosen) according to the (direct) order (of the castes), are most approved" (Manu III-12).

After having premised this (another sage, Vishnu, XXIV, 1 to 5) says:—"(1) Now a Brahmin may take four wives in the direct order of the (four) castes, (2) a Kshatriya three, (3) a Vaishya two," and thereby (though these authors, Manu and Vishnu), would allow to the twice-born men, marriages with Sudra women, yet, "it is not my," Yajnavalkya's, "opinion" "Because he," the twice-born, "is born himself therein."

As says a Shruti (Aitareya Brahmana VII, 13, 10, or 7):—"His wife is only then a real wife (*jaya* from *jan* to be born) when he is born (*jayate*) in her again." Hereby assigning, the reason, "that out of her he is born himself," the author prohibits a marriage with a Sudra woman for one who is desirous of begetting a Naityaka (necessary son). But in the case of not being able to produce a Naityaka son, in producing an optional son for a Brahmana, a Kshatriya, and Vaishya woman, and for a Kshatriya, a Vaishya woman, are allowed.

Now the author describes the order in which such inter-marriage may take place for him who is still desirous of sexual gratifications, though he has got a son, or has lost his wife and is not entitled to enter another order (*asrama*), but is anxious to remain in the order of the house-holder.

LVII.—Three, according to the order of the caste, so also two, and one for a Brahmana, a Kshatriya and Vaishya respectively (may be the wives). To a person born as a Sudra, a girl of his own caste is his wife.—57.

According to the order of the classes, for the Brahmana three, for the Kshatriya two wives, and for the Vaishya one wife are ordained. A Sudra can have only one wife born in the same class.

It is an established rule that a wife of the same class has precedence over all other wives. In the absence of her that precedes, she that follows takes precedence (as the principal wife) in the due order (of classes). This is also the order in the injunction of begetting a son either as a substitute for a necessary (Nitya) son, or an optional (*Kamya*) son.

As to the son of a Sudra woman being counted among sons and being described in the Chapter on Partition, *e.g.*, where the author after enumerating the son begotten by a Brahmana upon his Kshatriya wife, is Murddhavasikta etc., ends with "this rule refers to wives regularly married," (Verses 90 and 91) that refers to the son of a person desirous of sexual enjoyment or who is simply desirous of remaining in the Asrama (order of house-holder) and does not refer to twice-born in legitimate wedlock.

The author now describes the special ceremonies to be observed in marrying girls of the same or of different classes.

YAJNAVALKYA.

LXII.—In marrying a girl of the same class the hand should be taken, the Kshatriya girl should take hold of an arrow, the Vaishya should hold a goad, in the marriage with one of higher class.—62.

In marrying a girl of one's own class the hand should be taken, according to the rules of one's own Grihya Sutra. A Kshatriya girl should hold an arrow, a Vaishya girl should hold a goad in her marriage with persons of higher classes. A Sudra girl should take hold of the end of the skirt. As it has been said by Manu (III. 44):—

"A Sudra girl marrying one of higher class should take hold of the hem of the (bridegroom's garment)."

Taking the verses of Yajnavalkya without the commentary it is clear that in the opinion of Yajnavalkya a twice-born person should not take a wife from a Sudra family but if at all a person is inclined to depart from that rule, he can do so on the lines indicated

in Verse No. 57. Far from there being a prohibition there is a provision for what Yajnavalkya is not in favour of. Here Yajnavalkya has adopted a style of expression which, to my mind, is clearly indicative of disapproval on his part of such marriages but of readiness to recognise departures from approved lines within the limits indicated in the next verse. Vijnaneshwara makes this clear in his commentary. The word *nishedha* (meaning prohibition) used by him in the commentary in Verse No. 56 must be read subject to the limitation which he points out in that very sentence and also subject to what he clearly lays down in his commentary on Verse No. 57.

This meaning is clear from the phraseology adopted by Yajnavalkya and Vijnaneshwara in Verse No. 92 in the next Chapter in the same *Adhyaya*. While speaking of *anulomajas* both Yajnavalkya and Vijnaneshwara use the word *vinna* (married woman) which indicates the recognition by them of valid marriages among those classes in their order.

No such word is used in Verses Nos. 93 and 94 relating to *pratilomajas*. Yajnavalkya expressly states in Verse No. 95 that all *pratilomajas* are bad (*asanta*) and *anulomajas* are good (*santa*).

Further, while speaking of the shares of sons belonging to different classes in Chapter I, Section 8 (in the Chapter on Dayavibhaga in the Mitakshara). There is provision made for sons born of *anuloma* marriages, but there is no provision for *pratilomaja* (see Stokes' Hindu Law Books p. 402, Mitakshara, Chap. I, Sec. 1, paragraphs 4 to 6). That indicates the validity of, and not prohibition against, *anuloma* marriages. I refer to these provisions only for the purpose of the present point and not as necessarily governing the rights of such sons at present.

Lastly, in the Prayaschitta Adhyaya Vijnaneshwara has made the meaning clear once more in his commentary on Verse No. 22 of that Adhyaya. I do not consider it necessary to quote the translation here, but the relevant passages may be found in the second paragraph of Clause 109 and Clause 111 at p. 49 of the Translation of the Prayaschitta Adhyaya published by the Panini Office, Bhuvaneshvari Asrama, (Allahabad) in 1913.

Thus, Yajnavalkya and Vijnaneshvara, whose opinions are binding upon us, do not lay down any prohibition as distinguished from disapproval of *anuloma* marriages.

The next authority that we have to consider is Nilakantha's opinion as expressed in his Mayukhas. In his Vyavahara Mayukha he refers to the division of property among sons of wives of different classes and has incidentally referred to *anuloma* and *pratiloma* marriages (see Mandlik's Hindu Law, pp. 46 and 47.) No doubt there the author does not deal with the question of marriage. He deals with it in his Saunskara Mayukha in the Chapter relating to marriages under the heading of *vivahakrama* (order of marriages). The passage may be found at p. 98 of the edition published by the Gujarathi Press.

The Verse No. 57 from Yajnavalkya is quoted and explained as referring to marriages other than a marriage with the woman of the same class; and the passage taken as a whole clearly shows that Nilakantha practically accepts the view as propounded in the Mitakshara that *anuloma* marriages are permissible. The passage concludes with a reference to Yajnavalkya's Verse No. 62 and a part of Manu's Verse (III, 44) which is also quoted by Vijnaneshwara in his commentary on Verse No. 62. The translation of this part of the Mitakshara is already quoted above.

Nilakantha's view appears to be further clear from his treatment of the subject of *anulomajas* and *pratilomajas* in the Saunskara Mayukha at pp. 120-121 of the same edition.

It would thus appear that Manu and Yajnavalkya, Vijnaneshwara and Nilakantha are agreed that the *anuloma* marriages are not prohibited. This reading of the Mitakshara and the Saunskara Mayukha conflicts with certain observations of Chandavarkar, J. in *Bai Kashi's case* (5), in which he refers to Vijnaneshwara as prohibiting such marriages.

It must be remembered that the learned Judge had to deal with a *pratiloma* marriage and his observations were mainly directed to such marriages. He has fully realised the difference between the two kinds of marriages and has refrained from expressing any definite opinion as to *anuloma* marriages, as would appear from his observations at p. 553 of the

report in *Bai Kashi's* case (5).

Thus the argument for the appellant derives no support from the two principal Smritis nor from the Mitakshara and the Saunskara Mayukha. How is then the prohibition to be inferred contrary to these opinions ? The only ground suggested is that such marriages are obsolete and must be taken to be prohibited by usage. I am unable to accept the view that because such marriages are obsolete they are illegal or prohibited by law. The prohibition must be found in the law-books or in the usage having the force of law. Such usage must be proved like any other fact. It may be that the fact of their being obsolete may render the proof of such usage easy.

But in the present case not only is there no proof of such usage, but the evidence, such as it is, goes to show that such marriages are not treated as illegal or void by the castes concerned. It seems to me that far too much weight is sought to be placed upon the circumstance that the *anuloma* marriages are more or less obsolete.

The opinions of Manu and Yajnavalkya and Vijnaneshvara and Nilakantha, if I may say so, are fairly reflected in the general attitude of the castes in these matters. They approve of marriages within their respective circles, and generally speaking disapprove of marriages outside their circles. They do not, however, necessarily refuse to recognise the marriages outside their circles but extend the same toleration socially to those who depart from the usual rule as the Smriti writers and the commentators have extended legally to *anuloma* marriages. The readiness on their part to recognise socially what is legally not prohibited depends necessarily upon the circumstances of such case as it arises, including the nature of the departure from the usual rule and the attitude of the parties concerned.

But the attitude of the castes, which is stated in different modern books as prohibiting inter-caste marriages altogether, is generally indicative of nothing more than the disapproval of such marriages according to the rules of practice of each different caste. It does not afford a sufficient justification for treating as illegal what has not been prohibited but in terms contemplated and allowed by law.

I have discussed the question specially with reference to the principal authorities of Hindu law accepted in this Presidency and to the decisions of this Court. I have considered the decisions of other High Courts ; but as a matter of law I have not been able to find any basis therein for inferring any legal prohibition of such marriages, and so far as they are based on usage, I do not think that they could be applied in their entirety to this Presidency.

I have not therefore referred to them specifically. I may add that I do not see anything in these judgments which necessarily conflicts with my view. No other legal objection to the marriage is suggested. I am, therefore, of opinion that the marriage in question is valid.

I would affirm the decree appealed from and dismiss the appeal with costs. The costs to be payable by the next friend.

Macleod, C. J.:—I agree.

Appeal dismissed.

A. I. R. 1922 Bombay 38.

MACLEOD, C. J. AND SHAH, J.

In re Danappa Narasappa—Accused-Appellant.

Criminal Appeal No. 487 of 1921, decided on 3rd November, 1921, from an order passed by S. J., Bijapur.

Penal Code, S. 193—False evidence—Sanction to prosecute should not be granted unless there are chances of conviction—Statements should be mentioned in the sanction—Cr. P. C., S. 195.

Sanction ought not to be given unless the Court giving sanction has satisfied itself that there are very favourable chances of obtaining a conviction. When sanction is given to prosecute for giving false evidence the actual statements, which are alleged to be false, should be mentioned in the sanction. [P. 39, C. 1]

P. B. Shingne—for Appellant.

S.S. Patkar—for the Crown.

Macleod, C. J. :—The two applicants gave evidence in the case in which the opponents were charged with murder and were acquitted. The opponents then asked the Court to sanction the prosecution of the applicants for giving false evidence. Notice to show cause why sanction should

not be given was issued on the applicants, but for some reason or other they did not appear. The Sessions Judge gave sanction to prosecute without giving any reasons.

It may be that the evidence given by the applicants was false, or it may be that the trying Judge was justified in merely holding that he did not believe it. But sanction ought not to be given unless the Court giving sanction has satisfied itself that there are very favourable chances of obtaining a conviction. Having considered the evidence given by the applicants, we do not consider it by any means certain that the prosecution could prove that the applicants had given false evidence under the provisions of Section 193, Indian Penal Code.

In these circumstances, it is not advisable that sanction should be given. It may be noted that it is not the Government which are asking for sanction, but the accused in the case, who were acquitted, and who were thus influenced by embittered feelings against these witnesses for the prosecution. Therefore, the sanction given to prosecute the applicants will be set aside.

It is desirable to add that when sanction is given to prosecute for giving false evidence, the actual statements which are alleged to be false should be mentioned in the sanction.

Sanction revoked.

A. I. R. 1922 Bombay 39.

MACLEOD, C. J. AND KANGA, J.

Ramrattan—Accused-Applicant

v.

Emperor—Opposite-party.

Criminal Application for Revision No. 318 of 1921, decided on 27th October, 1921, from an order passed by First Class Magistrate, Ahmednagar.

Criminal P. C. (Act V of 1898), S. 179—'Consequence' has only its ordinary meaning—Money sent from place A to agent in place B—Breach of trust in B—Court at A can try offence—Penal Code, S. 409.

One of the consequences of criminal breach of trust, if committed by an agent, would be loss to the person to whom, the property entrusted to the agent, belonged, and therefore as the complainant would be entitled to get the proceeds of the articles, sent to the agent, paid to him; if the proceeds were not paid to him, loss would be incurred at the place where he lives and therefore the Court would have jurisdiction. Section 181 (2) in no way restricts the provision of Section 179. There is nothing, in that section which prevents a Court within whose local limits any consequences of an offence have ensued, having jurisdiction to try the offence.

The word "Consequence" in Section 179 bears its ordinary grammatical meaning and is not restricted to meaning a consequence which is a necessary ingredient of the offence.

[P. 39, C. 2; P. 40, C. 1, 2.]

Patwardhan with *P. S. Bhakle*—for Applicant.

Macleod, C. J. :—The complainant in this case charged the accused with the commission of the offence of criminal breach of trust punishable under Section 409 of the Indian Penal Code. The complaint was lodged in the Court of the Sub-divisional Magistrate, First Class, Ahmednagar. After a charge had been framed and after the accused had re-called some of the prosecution witnesses for cross-examination and cited witnesses in his own defence an objection was taken that the Court had no jurisdiction to try the case.

The Magistrate held that the objection could not be sustained as Section 179 of the Criminal Procedure Code applied. The accused has applied to this Court in revision to set aside this order of the Magistrate. Section 179 says:—

"When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

In this case the complainant had sent cotton from Ahmednagar to Bombay to the accused for sale as his commission agent. The charge that has been framed against him is under Section 409 of the Indian Penal Code which deals with criminal breach of trust by a public servant or by a banker, merchant or agent.

Now it seems clear that one of the consequences of criminal breach of trust, if committed by an agent, would be loss to the person to whom the property entrusted to the agent belonged, and therefore as the complainant would be entitled to get the proceeds of the cotton sent to Bombay paid to him in Ahmednagar, if the proceeds were not

paid to him, loss would be incurred at Ahmednagar and therefore the Court at Ahmednagar would have jurisdiction. Reliance is placed on Section 181 (2) of the Criminal Procedure Code but that section in no way restricts the provisions of Section 179 since it merely provides that—

"The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed."

There is nothing, therefore, in that section which prevents a Court within whose local limits any consequence of an offence has ensued, having jurisdiction to try the offence.

Counsel for the accused relied on the case at *Simhachalam* v. *Emperor* (1). The important paragraph of the judgment in that case is at the bottom of page 915 :—

"Now, for the application of Section 179 it is essential that the offence should depend on an act done and on a consequence which has ensued. But loss to one person, though a normal result of an act of misappropriation by another, is not an essential ingredient of the offence of criminal misappropriation.

The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender irrespective of any loss which may ensue to any other person. The offence does not depend on the consequence which has ensued but only on the act which has been done. Section 179, therefore, does not in terms apply."

In *Rambilas*, *In re* (2) the learned Judges said :—

"The offence of criminal breach of trust is completed (assuming a preliminary trust by the misappropriation or conversion of the property (in this case the cash proceeds of the hundis) dishonestly, *i.e.*, with the intention of causing wrongful gain or wrongful loss. It is only the ***intention*** which is essential. Whether wrongful gain or loss actually results is immaterial; it is a consequence, but no essential part of the offence and a person is not accused of the offence by reason of it."

A contrary view was taken in *Queen-Empress* v. *O'Brien* (3) Edge, C. J. said:—

"The case against the applicant is one of an offence alleged to have been committed by him under Section 408 of the Indian Penal Code. The contention on his behalf is that, if he committed any offence, it was committed in Lower Bengal and not within the Magistrate's jurisdiction at Cawnpore. Of course I express no opinion whatever as to whether the applicant committed an offence at all. That matter has yet to be decided. If, however, he parted with goods of his employers in Lower Bengal and did not remit the price of those goods, as he was bound to do to his employers in Cawnpore, it appears to me that the case comes within Section 179 of the Code of Criminal Procedure ; that the consequence of the applicant having made away with, for his own purposes, goods of his employers in Lower Bengal, or the price of them, if he did so, was that a loss of the value of those goods ensued to his employers in Cawnpore. It might be very difficult to prove where the actual offence of breach of trust was committed. Of course the applicant denies he has committed any. At one time he said the goods were on their way to Cawnpore. Another time he said the goods were at Lucknow. The goods have disappeared. The applicant went to Cawnpore and failed to account. The matter can be inquired into at Cawnpore, and the Magistrate at Cawnpore has jurisdiction in the case."

In my opinion the argument of the learned Chief Justice should be preferred to the arguments of the learned Judges in *Simhachalam* v. *Emperor* (1) and *In re Rambilas* (2). The decision in *Queen-Empress* v. *O'Brien* (3) was followed by the Allahabad High Court in *Langridge* v. *Atkins* (4).

The whole question seems to me to depend on whether we must give to the word " consequence " in Section 179 its ordinary grammatical meaning or whether we can restrict it to meaning a consequence which is a necessary ingredient of the offence, I see no justification for holding that the ordinary meaning should not be given to the word " consequence" in

(1) (1917) 44 Cal. 912=21 C. W. N. 573= 41 I. C, 138=25 C. L. J. 451.
(2) (1914) 33 Mad. 639=26 I. C. 136= 1914 M.W.N. 894.
(3) (1896) 19 All. 111=1896 A.W.N. 191.
(4) (1913) 35 All. 29=17 I. C 792= 10 A.L.J. 431.

Section 179 and the argument in *Queen-Empress* v. *O'brien* (3) seems clearly pertinent in reference to this point. For instance, an agent might be given goods by his employer to sell at various places, and if he performed the trust imposed upon him he would be bound to pay the proceeds of the goods which had been sold to his employer. If he did not, and if his employer charged him with criminal misappropriation, it would he exceedingly difficult to prove at what place he had sold any part of the goods and misappropriated the proceeds. It seems to me that Section 179 was intended to apply to such cases so as to enable an employer to file his complaint in the Court within whose jurisdiction the loss was alleged to have been incurred.

In my opinion, therefore, the decisions of the Allahabad High Court should be followed and there is no reason to admit this application for revision of the Sub-Divisional Magistrate's order.

Kanga, J:—I agree.

Appeal rejected.

A. I. R. 1922 Bombay 41.

• MACLEOD, C. J. AND SHAH, J.

Bai Adhar—Plaintiff-Appellant

v.

Lalbhai Hirachand — Defendant-Respondent.

Second Appeal No. 234 of 1921 decided on 29th November, 1921, from a decision of Joint Judge, Ahmedabad, in Appeal No. 209 of 1920.

Evidence Act (I of 1872), S. 92, Sale deed—Oral evidence to vary terms of the deed is not admissible.

When the document in question is in terms a sale deed, no evidence to vary the term of the deed can be admitted unless the case can be brought within any of the provisos to Section 92 of the Indian Evidence Act. [P. 41, C. 2]

G. N. Thakor—for Appellant.

H. V. Divatia—for Respondent.

Macleod, C. J.—The plaintiff sued to obtain a declaration and accounts with respect to the plaint house in the city of Ahmedabad. It belonged to her step-brother Trikamlal. He mortgaged the property to the defendant on the 11th February, 1912 and sold it to the defendant on the 12th October, 1916, the consideration being Rs 1,081. The plaintiff alleged that there was an arrangement that the property should be reconveyed to Trikamlal or his heirs on their repaying the total advances received, free from the burden of the alleged sale. The plaintiff, therefore, wished to prove an oral agreement to reconvey on taking an account. It is admitted that the evidence, which was sought to be adduced to prove this, does not come within any of the provisos of Section 92 of the Indian Evidence Act.

But a most extraordinary argument has been urged before us based on the evidence which cannot be called. It is first assumed that there was this arrangement, and then we are asked to believe that there must have been a representation, made by the defendant to Trikamlal that the document was never to be enforced as a sale deed but was to be treated as a mortgage. That is not an argument which appeals to me, being contrary to the cases decided by this Court.

There may be cases in which parties may succeed in getting the Court to agree that the evidence which is tendered may come within one of the provisos by implication, and the case relied upon by the appellant, *Kvishna Bai* v. *Rama* (1) may be one of those. But this is certainly not one of those cases which can possibly be brought within any of the provisos.

The document in suit is a plain sale-deed and it is attempted to prove, by an oral agreement to reconvey and take the accounts, that it is something different. I think that the appeal must be dismissed with costs.

Shah, J—I agree. I desire to add that on the allegations in the plaint I am satisfied that the view taken by the lower Courts as to the inadmissibility of the oral evidence to prove the alleged variation of the terms of the sale-deed is right. Apart from any of the decided cases bearing on this point, it seems to me clear on these allegations that the case cannot be brought within any of the provisos to Section 92 of the Indian Evidence Act.

The document in question is in terms a sale-deed, and no evidence to vary the terms of the deed can be admitted unless the case can be brought within any of the provisos. It is not easy to reconcile all the decisions of this Court on the point. But it seems to me that each case has to be decided with reference to the facts and pleadings of that case, and that there is no real conflict of any principle, though it may not be always easy to apply it in an

(1) (1906) 8 Bom. L. R. 764.

apparently consistent manner.

Appeal dismissed.

A. I. R. 1922 Bombay 42.

MACLEOD, C. J. AND SHAH, J.

J. D. Sherston Baker—Applicant

v.

Emperor—Opposite Party.

Criminal Application for Revision No. 262 of 1921, decided on 2nd November, 1921, from an order passed by Acting 3rd Presidency Magistrate, Bombay.

Motor Vehicles Act of 1914, Ss. 10 and 11—Bombay Motor Vehicles Rules of 1915 as amended by Rules of 1918—Rule 6 (1) (B) and Schedule D—Ultra vires—*Fixing of time limit of the certificate* is ultra vires.

It is *ultra vires* of the local Government to fix a time limit in the registration certificate and to make a corresponding change in the Schedule D as no power was given by S. 11 of of the India Motor Vehicles Act to make rules for that purpose. Rule 6 of the Bombay Motor Vehicle Rules as amended is invalid and inoperative.

[P. 43, C. 2.]

O. Gorman with *Little & Co.*,—for Applicant.

Bahadurji with *J. C. Bowen*—for the Crown.

Macleod, C. J.—The applicant in this case was charged with having caused his motor car to be driven along the Queen's Road on the 27th May, 1921, without having re-registered the same for the year 1921, in contravention of Rule 6 (1) (*b*) of the Bombay Motor Vehicle Rules, 1915 as amended by the Rules published on the 18th December, 1918. The applicant contended that the said Rule as amended was and is *ultra vires* of the powers conferred on the Local Government by Sections 10 and 11 of the Indian Motor Vehicles Act, 1915, and that the same was invalid and of no effect.

The third Presidency Magistrate, however convicted the applicant under the said amended rule and sentenced him to pay a fine of one rupee. The applicant has applied to us under our revisional powers to set aside the conviction and sentence. The learned Magistrate has given no reasons for his decision.

Section 10 of the Act provides that (1) the owner of every motor vehicle shall cause it to be registered in the prescribed manner, and (2) that such registration shall be valid in such area as may be specified in the certificate of registration, and by Section 11, the Local Government, subject to the condition of previous publication, shall make rules for the purpose of carrying into effect the provisions of the Act and of regulating, in the whole or any part of the territories under its administration, the use of motor vehicles or any class of motor vehicles in public places. By sub-Section (2) in particular, and without prejudice to the generality of the foregoing powers the Local Government may make rules for all or any of the following purposes, which are detailed in the headings (*a*) to (*i*).

Under (*a*) rules may be made providing for the registration of motor vehicles, and the conditions subject to which such vehicles may be registered, the fees payable in respect of and incidental to registration, the issue of certificates of registration, the notification of any changes of ownership, and (subject to the provisions of Section 10) the area in which certificates or registration shall be valid.

Rule 6 of the Bombay Motor Vehicles Rules, 1915, framed by the local Government under its powers given by Section 11 of the Act provided that subject to the provisions contained in sub-Rule (2) of rule 13, no motor vehicle should be used unless it had been first registered by the registering authority, and any motor vehicle which had already been registered under the Act did not need to be re-registered.

Rule 73 provided that every registration certificate granted under Section 10 of the Act should be in the form of Schedule D and should be available for the whole of British India.

It will be noted that the Rule did not provide for any limit of time during which the certificate should be valid.

On the 18th December, 1918, the Local Government published amendments to the Bombay Motor Vehicles Rules, 1915.

The following rule was substituted for the existing Rule 6:—

(1) No motor vehicle shall be used save in accordance with Rule 14 or for the purpose of procuring registration—

(*a*) unless it has been registered by the registering authority, and (*b*) unless the registration certificate granted in respect of it is in force.

(2) Registration certificates granted in accordance with Rule 73 and Schedule D shall expire on the 31st December in the year in which they are granted but shall be renewable.

(3) Registration certificates granted

before the 18th December, 1918, shall expire on the 28th February, 1919.

(4) Notwithstanding anything in this rule any registration certificate granted under any enactment for the time being in force in any part of British India other than the Presidency of Bombay or in any State in India included in Schedule N shall be valid in the Presidency of Bombay until the date of its expiry.

Then in Rule 7 for the word "provided" the following was substituted :—

"Provided that no fee shall be charged for the renewal of a registration certificate in any case where the application for renewal is made before the expiry of the certificate."

Various changes were made in Schedule D, the important one for the purpose of this case being that immediately below "Registration Certificate" the words "Valid for the year ending the 31st December, 1919" were to be inserted.

The result of the amendment of the rules was that owners of motor vehicles who had registration certificates granted before the 18th December, 1918 had to renew their certificates before the 28th February, 1919, and that every certificate granted after the 18th December, 1918 was only valid up to the 31st December, 1919. If then an owner neglected to renew his certificate before the expiry of the period for which it was valid, he was treated by the authorities as a person who had not caused his motor vehicle to be registered in the prescribed manner, and in order to come within the provisions of Section 10 of the Act he was liable to be charged with a fresh fee before he could get his certificate renewed.

Now it is contended by the applicant that the amendment of the rules by the Local Government limiting the duration of time for which a certificate was to be valid was *ultra vires* as no power was given by Section 11, to make rules for that purpose. Special reference was made to heading (*d*) of Section 11, sub-Section (2) which enabled the local Government to make rules prescribing the authority by which, and the conditions subject to which, drivers of motor vehicles or any class of such drivers might be licensed, the fees payable in respect of such licences, and (subject to the provisions of Section 9), the area within which, and the duration for which, licences should be valid. Where it was intended to give the power to make rules prescribing a time limit it was expressly given to that effect and in our opinion heading (*a*) of Section 11, sub-Section 2, does not by implication give a power to the local Government to prescribe by rule the duration of time during which a certificate of registration shall be valid.

It has been contended that the local Government could make rules providing for the conditions subject to which the motor vehicles might be registered, and the duration of time was one of the conditions of registration.

But we do not think there is any force in that argument, although the same words appear in heading (*d*), it was expressly provided that the duration of time during which licences should be valid should be prescribed by rule.

Lastly, it was argued that the rule was made under the general powers given by sub-Section (1) but such a provision must be strictly construed and when the rules which can be made relating to the registration of motor vehicles, are defined by Section 2 (*a*) it is clear that the legislature intended that any rules relating to registration must come within that definition.

We think, therefore, that the contention of the applicant must prevail, and that the amendment of the rules which were made on the 18th December, 1918, so far as they provided that registration certificates should expire on the 31st December in the year in which they were granted was *ultra vires* of the Local Government. It would also follow that the corresponding amendment of the form in Schedule D was *ultra vires*, and that the certificates of registration granted according to the amended form should be considered as if the words "valid for the year ending the 31st December, 1919," were not added.

Therefore, as the applicant had a certificate, he had complied with the provisions of Section 10 of the Act and the conviction under Section 16 of the Act must be set aside and the fine, if paid, refunded.

Shah, J. :—I agree.

Conviction set aside.

A. I. R. 1922 Bombay 44.

MACLEOD, C. J. AND SHAH, J.

Chunilal Dayabhai and Company—Plaintiffs-Appellants

v.

The Ahmedabad Fine Spinning and Weaving Co.—Defendants-Respondents.

First Appeal No. 216 of 1920, decided on 21st December, 1921 from the decision of Addl. First Class S. J., Ahmedabad in Suit No. 552 of 1918.

Contract—Condition in the contract, not to demand damages in case of breach—Party cannot commit breach without giving any reason.

Particular words, "If the obligor does not give delivery for any reason the utmost that will be the result will be that the contract will be cancelled, but the obligee will not ask for damages arising from the same", cannot be read, as meaning that the parties agreed that if the obligor simply refused to give delivery, the obligee was bound to accept such a refusal without being able to claim damages. The clause evidently means that some reason must be given by the obligor which should justify his refusing to give delivery. [P. 44, C. 2; P. 45, C. 1.]

B. J. Desai with *G. N. Thakor*—for Appellants.

Coyajee with *Ratanlal Ranchhoddas* and *H. J. Kania*—for Respondents.

Macleod, C. J.:—The plaintiffs sued to recover damages in respect of non-delivery of certain goods by the defendants. Under the contract which is dated the 17th June, 1916, the plaintiffs agreed to purchase certain goods produced by the defendant mill. The contract states:—

"We have purchased goods that are in course of preparation so that we shall take delivery of the goods from time to time as we receive notice from the Company of their being ready. If we do not take delivery of the goods purchased within the period fixed for taking delivery as stated above you are at liberty to keep the said goods on our account and risk or to sell them either by public auction or by private contract, and we shall make good to you the damage, if any, that you may have to suffer by reason of your having to resell the goods in that way. If we do not take delivery of goods which are purchased under preparation on receiving notice from you, or goods to be delivered at a particular period on the expiration of that period interest at the rate of six per cent. and expense of insurance etc., will run against us so long as the goods remain on our risk and account either in the godown of the mill or in the Company's godown in the market, "If the Company's mill stops or if the mill meets with any accident or obstacle or if the mill stops by reason of some circumstance or on account of strike you are at liberty to cancel all the goods written in the contract or the portion that may have remained undelivered without giving us damages. If you are not in a position to deliver the goods or if there be any dispute in respect of the goods, or if the Company do not give delivery for any reason the utmost that will be the result will be that the 'Soda' will be cancelled but we shall not ask for damages arising from the same from you in any way."

The plaintiffs took delivery of 90 bales out of 151 mentioned in the contract. Then the defendants declined to give further delivery without giving any reason for such refusal. Accordingly the plaintiffs filed this suit for damages. So far as I can see the defence was that the defendants were not obliged to give any reasons according to the terms of the contract for refusing to complete the delivery. The first issue raised was whether the plaintiffs have got a cause of action to sue for damages.

The learned Judge held that the clause with regard to the avoidance of the contract for any reason should be read strictly, and therefore, the defendants were justified in merely refusing to give delivery without assigning any reason, and the plaintiffs had no remedy. The suit was accordingly dismissed.

I need not refer to the amendment which was allowed in the plaint so as to include a prayer for specific performance beyond stating that it was obvious, from whatever point of view we look at the case, that the plaintiffs could not demand specific performance.

Now I do not think that the learned Judge has construed the contract in the proper way. I do not think that those particular words, "If the Company do not give delivery for any reason the utmost that will be the result will be that the 'Soda' will be cancelled, but we shall not ask for damage arising from the same," can be read as meaning that the parties agreed that, if the defendants simply refused to give delivery, the plaintiffs were bound to accept such a refusal without being able to claim damages if they wished to do so. It seems to me that the clause evidently means that some reason must be given by the defen-

dants which would justify their refusing to give delivery, and that they were not entitled merely to say that the contract was off, because they did not wish to deliver any more goods under it.

A reference has been made to *New Zealand Shipping Company* v. *Societe Des Ateliers Et Chantiers De France* (1). The facts there were different, but the principles laid down by their Lordships would apply to a case of this kind. The terms of the contract in that case were—If the construction of the steamer contracted to be built was delayed by an unpreventable cause beyond the control of the builders, the time for the construction would be extended, and in case the builders should be unable to deliver the steamer within, in the event of France becoming engaged in a European war, 18 months from the date agreed by the contract for completion, thereupon this contract shall become void.

Lord Shaw said at p. 12: —

"The answer to the whole of this is clearly put by Bailhache, J.—that the stipulation as to the contract becoming 'void' is a stipulation in favour of both parties. This is subject only to this, that the conduct or situation of the party treating the contract as void shall not have been the means whereby the event which gives rise to the condition has been brought about. What I have ventured last to express appears to me to be sound in principle and to be a better and broader expression of the principle than a reference to either, a party's own wrong or a party's own default, for without either definite wrong or default the action, or even the situation, of one of the parties may be sufficient to produce the condition. I prefer more than any other as an expression of the principle that which occurs in Coke upon Littleton (206 *b*), and is quoted with approval by Lord Ellenborough in *Rode* v. *Farr* (2) " for that he himself is the mean that the condition could never be performed."

Therefore, if the parties agreed in certain events that the contract should become void, that would not mean that one of the parties could himself bring about the state of affairs which would avoid the contract. So that in this case it was not competent for the defendants merely to say that they did not wish to give any further delivery, and that, therefore, the contract should be cancelled without any claim for damages arising in favour of the plaintiffs.

The decision of the lower Court was wrong. The case must go back to be tried on its merits. If the defendants are able to satisfy the Court that they had just cause for cancelling the contract, of course it is open to them to do so. The plaintiffs must have the costs of the appeal. Costs in the Court below will be costs in the cause.

Shah, J.:—I agree.

Appeal allowed.

(1) (1919) H. C. 1=62 S. J. 519=34 T. L. R. 400=87 L. J. K. B. 746.
(2 (1817) 6 M & S. 121=105 E. R 1188

A. I. R. 1922 Bombay 45.

MACLEOD, C. J. AND SHAH, J.

Chandmal Kesarmal and others—Plaintiffs. Appellants

v.

Vishvanath Balwant Sohoni —Defendants-Respondents.

Second Appeal No. 74 of 1921, decided on 23rd December 1921, from a decision of District Judge, Ahmednagar in Appeal No. 166 of 1918.

(a) *Lease—Lease to* lessee putra poutradi santati—*Death of lessee before expiry of lease—Lease would descend to his heir and is not resumable by grantor.*

Where a lease was granted to the lessee his sons, grandsons and descendants, held that the house would be deemed to have been let absolutely for the period and that on lessee's death before the expiry of the period, it would descend to his heir alienable and never resumable, unless in a particular case, some custom were proved which would exclude the ordinary law; for instance, if it were found that these words applied to a devise of an estate which by custom, descended only in the male line, then they could not be held to convey an absolute estate of inheritance. There is no difference whether such words be found in a will or lease. [P. 46, C. 1.]

(b) *Words and Phrases*—Putra Poutradi Santati —*Words convey absolute estate.*

The above words when found in a will convey an estate of inheritance. [P. 46, C. 1.]

S. S. Patkar, Government Pleader—for Appellants.

Coyajee with *G. S. Mulgaonkar*—for Respondents.

Macleod, C. J.:—The plaintiff company sued to recover land which was originally leased to one Pemraj under a

rent-note passed by him on the 1st October, 1905. The defendants Nos. 3 and 4 who resist the plaintiff's claim, are the sister's sons of Pemraj. The case for the plaintiff is that the lease was only to Pemraj and his wife and his direct descendants, thus excluding the collaterals. This construction of the document has found favour in both the lower Courts. But I do not think that that is the way to look at this particular document which amounts to a lease of particular premises for forty years to Pemraj, and if there had been no words of limitation the leasehold interest would pass to his heirs.

The question is whether we can extract from the document any intention that the lease on the death of Pemraj and his wife should descend in a particular manner. The words are पुत्र पौत्रादि संतति which are translated 'sons and grandsons and our lineage." It is clear from the decision in *Ramlal Mookerjee* v. *Secretary of State* (1), that those words *putra poutradi* and lineage when found in a will, convey an estate of inheritance, and the same conclusion was arrived at in *Perkash Lal* v. *Rameshwar Nath Singh* (2) where their Lordships recognised that these words had been held to convey absolute estates of inheritance, alienable and never resumable unless in a particular case some custom were proved which would exclude the ordinary law for instance. If it were found that these words were applied to a devise of an estate which by custom descended only in the male line, then they could not be held to convey an absolute estate of inheritance.

There is no difference whether such words be found in a will or lease, and there is nothing in this particular document on the facts proved which would show that the period of forty years for which the rent-note was to run, was to terminate before the expiry of forty years, in the event of the line of the direct descendants to Pemraj coming to an end. In my opinion this document should be construed as leasing the premises absolutely to Pemraj for a period of forty years and the result would be that on the death of Pemraj it would go to his heirs.

No doubt the fact that the wife is mentioned in the document might create a difficulty, since in the event of Pemraj dying before his wife, she might claim a life-estate in the lease to the exclusion of his heirs. However that question need not be considered. Taking a general view of the lease, and in the absence of any claim by the wife, we are entitled to come to the conclusion that it was a lease to Pemraj for forty years without any limitation.

Therefore the appeal should be allowed and the plaintiff's suit dismissed with costs throughout. The direction that the plaintiff should get possession should be struck out. The direction with regard to payment of rent should stand.

Appeal allowed.

(1) (1882) 7 Cal. 304=8 I. A. 46=4 Sar. 225.
(2) (1904) 31 Cal. 561.

A. I. R. 1922 Bombay 46.

MACLEOD, C. J., AND SHAH, J.

The Central India Spinning and Weaving Co.—Plaintiffs-Appellants

v.

G. I. P. Railway—Defendant-Respondent.

O. C. J. App. No. 41 of 1921, decided on 1st December, 1921, from the decision of Kajiji, J.

Railways Act, S. 72—Risk-note H—Loss of one or complete package—Conduct of the Railway Company—Prima facie *evidence against company let in*—Onus *of proof shifts to Railway Company.*

In a case of bales booked from a station on one Railway to another place over a different railway if the bales are packed in a waggon sealed at the sending station, there is a legitimate inference that the waggon was broken open at the sending place where the goods could be disposed of without exciting any suspicion, and even if it occurred after the waggon left the station of despatch, that either some of the company servants were concerned in the theft or the theft occurred owing to the company's servants' wilful neglect. There being a *prima facie* case against the railway, it is for the railway company to offer some reasonable explanation in order to escape liability. [P. 49, C. 2 ; P. 50, C. 1 & 2.]

Desai and *Mulla*—for Appellants.

Strangman and Campbell—for Respondents.

Macleod, C. J.:—This is an appeal from the decision of Kajiji, J. dismissing the plaintiffs' suit with costs.

On the 19th August, 1918, the plaintiffs delivered to the defendant company at Nagpur fifty-seven bales of piece-goods to be conveyed from Nagpur to Amritsar and the defendant company issued a railway receipt for the said bales to the plaintiffs. The goods were booked under

a risk-note in Form H whereby the plaintiffs, in consideration of the consignment being charged for at the special reduced or owner's risk rates, agreed and undertook to hold the Railway Administration and all other Railway Administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively over whose railways or by or through whose transport agency or agencies the said goods might be carried in transit harmless and free from all responsibility for any loss, destruction or deterioration of or damage to all or any of the said consignment from any cause whatever except for a loss of the complete consignment or of one or more complete packages forming part of the same consignment, due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants, transport agents, or carriers employed by them before, during or after transit over the said railway or other railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for carriage of the whole or any part of the said consignment provided that the term 'wilful neglect' should not be held to include fire, robbery on running train or any unforeseen event or accident.

The said goods were carried over the railway of the defendant company from Nagpur to Delhi, then over the railway of the East India Railway Co., from Delhi to Umbala, and lastly over the railway of the North-Western Railway Co., from Umballa to Amritsar. The goods arrived at Amritsar on or about the 6th September, but only fifty-four out of the fifty-seven bales were delivered to the plaintiffs' consignees.

A lengthy correspondence ensued in which the defendant company at first contended that the loss had not occurred on their railway and therefore they were not liable, disregarding the provisions of Section 80 of the Indian Railways Act. Finally, on the 31st July, 1919, the defendants wrote that for the reasons already stated in the previous correspondence they were not liable for the claim. The suit was filed on the 5th September claiming the sum of Rs. 1,582-7-0, the value of the three missing bales and interest.

The defendants in their written statement admitted the short delivery but denied that the loss of the three bales was due either to the wilful neglect of the defendant company or to theft by or to the wilful default of their servants as alleged.

At the hearing the following issues were raised,—

(1) Whether the loss of the three bales was due to the wilful neglect of the defendant company?

(2) Whether the loss of the said bales was due to theft by or wilful default of the defendant company's agents or servants?

The third issue was immaterial.

Leave was then granted to amend the plaint so that the following issue might be raised:—

Whether the goods were not conveyed over the East India Railway Company and the North-Western Railway Company at railway risk, and Clause 10-A was added to the plaint, claiming that if the goods were lost after they left Delhi the defendants were liable in any event.

The defendant company replied that they were not liable for the claim made on the assumption that the bales were lost on a line of railway other than the defendants. The evidence shows that the plaintiffs' goods were loaded at Nagpur in one waggon the doors of which were sealed with a seal bearing the following description N. G. P. 18. When the waggon arrived at Amritsar the unloading clerk noticed that the seal on one side bore the inscription N. G. P. in large characters without any figure and so the police were sent for.

The seals were broken in the presence of Khairuddin of the Government Railway Police and on the waggon being unloaded three bales were found to be missing. Smith who was Station Master at Nagpur in August—September, 1918 said that during his time no such seal as N. G. P. (Exhibit J.) was used. Mr. Schofield, Assistant Traffic Superintendent (Claims) N. W. Railway Co., deposed that when goods were booked on a foreign line, to their line and waggon arrived at Amballa the train clerk in conjunction with the guard of the in-coming train and the Chowkidar examined the seals of the waggon and reported if they were defective. No such report was made in this case. He made inquiries and was informed that there

were no foot boards on the waggon in the suit so that it would not be possible to substitute the seals while the train was running. The witness also stated that the seals bearing different types were discovered after the waggon had been unloaded, *i.e.*, after one of the seals had been removed.

The defendants called no evidence.

Some of their servants were present and were offered for examination by plaintiffs' counsel but Mr. Mulla said they ought to have been called by the defendants. The learned judge thought that as a matter of fact if the defendants had called them they would not have thrown any further light on the question how the loss occurred. Clearly the onus lay on the plaintiffs who had signed the risk-note in Form H to prove either that the defendants were liable under the terms of the note, or to satisfy the Court that the proper inference to be drawn from the facts proved was that the defendants were liable. It is not suggested the theft was from a running train.

The learned Judge says Mr. Mulla advanced two theories. The first was that the loss occurred when the goods were still in the goods-yard at Nagpur station. The goods were booked on the 19th August, the waggon being sealed at 11-15 A.M. As the waggon remained for thirty hours in the Nagpur goods-yard, the theft must have been committed by the defendant's servants or it must have occurred owing to their wilful neglect.

The second theory was that if the theft was not committed by the employees of the defendants it was due to the neglect of one of its servants, *i.e.*, the Chowkidar. But it will be seen that this was only part of the first theory. The learned Judge thought that the probabilities were against the theft having been committed in the Nagpur goods-yard. Any servant of the defendants intending to commit the theft and taking the trouble to prepare a seal to re-seal the waggon would have taken the precaution to prepare a seal similar to the one used by the defendants, and further it would require great daring for any servant to commit a theft from the goods-yard.

With regard to the question of neglect, Mr. Mulla had not called the Chowkidar who was available for examination. He, therefore, came to the conclusion that he was not satisfied that the loss was due either to theft by or to wilful neglect of a servant of the defendants.

Considerable light on the question, how a case of this nature should be dealt with, is thrown by the decision of the Court of Appeal in *Smith Ltd.*, v. *G. W. Ry. Co.* (1).

Certain traders delivered to the defendant railway company a parcel containing six pairs of boots weighing 19 lbs. for carriage from Birmingham to Wilton, near Salisbury, on the terms that the company should not be liable for loss, etc., except upon proof that the loss, etc., arose from the wilful misconduct of the Company's servants. The parcel was never delivered to the consignee. Eventually an action was brought to recover the value of the parcel. The defendant company offered no evidence. The County Court Judge decided in favour of the plaintiffs saying (p. 241):—

"I must look at the whole of the circumstances which may be equally consistent with one or more theories. If any one of these theories is adopted which would relieve the railway company from liability under the contract the claim certainly could not succeed, but if there is evidence strongly preponderating in favour of one of those theories which in the absence of reasonable explanation by the company would fix them with liability, I am entitled to act upon it. There is in my opinion, evidence here which justifies me in finding, as I do, wilful misconduct on the part of the defendants."

The Divisional Court reversed this judgment.

The plaintiffs appealed. Banker, L. J. said (p. 243):—

"I pass now to consider the point which was taken in the county Court, whether the evidence laid by the appellants was such as to justify an inference that the parcel was lost owing to the wilful misconduct of the railway company's servants. If there was evidence upon which the learned county Court Judge could properly draw that inference this Court cannot interfere with his decision. The learned Judge, in my opinion, directed himself quite correctly when he said; 'If there is evidence strongly preponderating in favour of one of such

(1) (1921) 2 K.B. 237=65 S. J. 172=90 L. J. K. B. 644.

theories which, in the absence of reasonable explanation by the company, would fix the defendants with liability, I am entitled to act upon it. That legitimate inference from established fact is evidence for the purpose of applying the above direction to the present case is, I think, clear beyond doubt. Although the learned Judge was undoubtedly entitled to draw inferences from the facts proved before him, the inferences must be such as could legitimately be drawn from the facts. If the facts are such that no reasonable man could draw a particular inference from them, or if the particular inference is such as to be equally consistent with non-liability, and with liability, then the party, who relies on the inference to discharge the *onus* of proof of establishing liability, fails."

After discussing the evidence the learned Lord Justice came to the conclusion that there were no materials in the case upon which a charge of bad faith could be sustained. In the absence of any evidence of bad faith the evidence adduced for the appellants was not in his opinion capable of the inference that the parcel must have been lost owing to the wilful misconduct of the defendant's servants. The evidence left the question entirely open as to the cause of the loss. Scrutton, L. J., said (pp. 249, 250):—

"It is to be noted that the appeal being from a county Court Judge, who is the sole Judge of fact, the question is not whether the Court, on such evidence as there was, would have come to the same conclusion, but whether there is any evidence which could reasonably, if accepted, be the basis of such a conclusion, in my opinion it is impossible to lay down any general rule as to the facts from which one can infer in the absence of explanation of loss, 'loss by wilful misconduct of the company's servants.' It must depend on the nature of the subject-matter and of the stage of the transit reached in each particular case.

"For instance, if the company were carrying an elephant and would say nothing as to why it was not delivered, as an elephant can hardly disappear without a company's servant knowing of it, one would easily find that it was loss either by wilful misconduct of the company's servants, or by their wilfully not at once informing some superior that it had disappeared when it could easily be traced and recovered. On the other hand if a small parcel disappeared from a place to which both the company's servants and outsiders had free access, in a time of a great pressure of business, it would be impossible to draw any inference as to what had really happened. In an action by the same goods owner against the *Midland Railway Company Smith Ltd.* v. *Midland Railway Co.* (2), this Court felt able to find wilful misconduct of the Company's servants from the fact that part of the contents of a parcel had disappeared, the parcel having been opened, repacked with rubbish, and done up again.

"In such a case such an operation must have taken some time, and have been carried out on the company's train by a person who could calculate on being free from disturbance for the considerable time taken in unpacking and repacking, facts which pointed strongly to theft by a servant of the company."

On consideration of the evidence the learned Lord Justice came to the conclusion that there were too many suppositions and assumptions in the case for the goods owner and that there was no ground on which it could reasonably be found as a fact that the goods were lost by wilful misconduct of the company's servant. Atkins, L. J. dissented. He considered there was *prima facie* evidence of conversion or detention and the defendants' long continued failure to give any explanation as to what had happened to the goods coupled with the inadequate explanation of the delay afforded some evidence upon which the Judge could find that there was a *prima facie* case that the conversion or detention was not innocent but wilful.

We are not restricted to finding whether there was any evidence which could reasonably if accepted be the basis of the conclusion of the learned Judge in the Court below. It is competent to us to find that on the facts, proved the inference drawn was not the right one.

Now it is admitted that the bales were packed in a waggon at Nagpur which was sealed. Thereafter the waggon would be on the railway line to which ordinarily the public would not have access unless they were travelling as passengers in passenger trains. Whoever committed

(2) (1919) 88 L. J. K. B. 868=121 L. T. 27

tively. But the evidence is unsatisfactory and no reliance can be placed on it. There is no writing about the debts and such oral evidence can be prepared at any time."

On reading the evidence admittedly adduced to prove the payments, there can be no doubt that the learned Judge was right in his appreciation of it. Because the sale-deed passed thirty years ago by a Hindu widow to an outsider could not be attacked until the death of the widow, it may seem hard that the defendant purchaser should be deprived of this property. But still the law in this country is perfectly well known that a widow cannot sell more than her own interest unless there is legal necessity, and the *onus* has rightly been placed on the purchaser to prove that the sale was for necessity.

Therefore, it was desirable that at any rate the debts which it was suggested were paid off out of the purchase price should have been recited in the deed and it was not sufficient that there should be merely a recital that the property had been sold for debts. The learned Judge pointed out:—

"There is absolutely nothing to show that Daji was really indebted. He possessed considerable land, both at Delada and Dholgam. It is probable that the suit lands were sold because the widow who resided at Dholgam could not manage them. On the evidence I am not prepared to hold that the sale was for necessity."

In any event it is impossible to come to the conclusion that the learned Judge was wrong in his appreciation of the evidence. The defendant has also failed to prove that his father spent about a thousand rupees on improvements as alleged in this case, and as the revenue of the land is said to be Rs. 320 a year, we think the defendant must have recouped the money which his father spent in purchasing the property with interest thereon.

The appeal fails and must be dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 52.

MACLEOD, C.J. AND SHAH, J.

Emperor—Applicant

v.

Balkrishna Govind Kulkarni—Respondent.

Criminal Application for Revision No. 211 of 1921, decided on 28th September, 1921, from an order by the Government of Bombay.

Penal Code, S. 228—Complaint pending before Magistrate—Comments in the newspaper—Reflecting on impartiality of Magistrate is contempt of Magistrate's Court—Contempt of lower Court may be contempt of High Court—Contempt.

Comments in a publication reflecting on the character or impartiality of the Magistrate in the course of the criminal trial, tend to deprive the Court of the power of doing that which is the end for which it exists, *i.e.*, to administer justice duly and impartially, and constitute necessarily a contempt of the Magistrate's Court [P. 53 ,C. 1.]

Per Macleod, C. J.—It is not that every contempt of an inferior Court is necessarily a contempt of High Court. It is a question which must be decided on the facts of each case. If the publication of the remarks in an article impedes the due administration of justice, it constitutes a contempt of High Court and it has jurisdiction and powers to deal with it as the King's Bench Division in England has [P. 62, C. 1, 2.]

Per Shah, J.—The High Court has no power to punish contempts of Criminal Court subordinate to it as the King's Bench has.

[P. 63, C. 2; P. 64, C. 2.]

G. N. Thakor and *H. B. Gumaste*—for Respondent.

Bahadurji with *S. S. Patkar*—for the Crown.

Macleod, C. J.:—This is a rule granted at the instance of the Government of Bombay calling upon Balkrishna Govind Kulkarni, Editor and Publisher of the *Shubhodaya* newspaper at Dharwar to show cause why he should not be committed for contempt of Court in respect of the publication of an article commenting on the proceedings in the Court of the First Class Magistrate at Dharwar against two volunteers of the Temperance Committee who were alleged to have extorted some money from a *Bhangi*.

The article commences:—

"Proceedings have been instituted against two volunteers of the Temperance Committee for the alleged extortion of thirteen annas and the hearing commenced ten days back. . . . The Police have appointed to conduct the case one of their inspectors who merely does what he is asked to do by the police and echoes them and earns his pay without any trouble. Every one in the town seems to be under the impression that the complainants voluntarily paid the fine and that the case owes its origin to the

pressure of the liquor contractors who desire to make fortune by selling toddy. Moreover there is a thick rumour that on the day on which the volunteers were arrested the trying Magistrate ran up the staircase of the Collector's Office and called on Mr. Painter and that some whisper took place between them. Again Police Sahebs sit in chairs on the Magistrate's dais and wink (at each other). The chief complainant is a Bhangi under the District Superintendent of Police who receives his pay from the Police Department."

There are further allegations that the District Police Superintendent was speaking in the middle when witnesses were being examined; that when the pleader for the accused observed that it was right that co-witnesses should be examined on the same day or else there was fear of the Police tutoring, the Court adjourned the hearing one hour earlier than the hour of closing of the Court prescribed by law; that although the evidence of the witnesses had been satisfactory, the accused were not enlarged on bail.

It can hardly be disputed that these remarks constitute a very gross contempt of Court.

In the first place such comments, while proceedings are pending in a Court of law tend to deprive the Court of the power of doing that which is the end for which it exists, to administer justice duly impartially, and with reference solely to the facts brought before it. Secondly, any remarks reflecting on the character or impartiality of the Magistrate in the course of the trial must necessarily be contempt: *Reg.* v. *Gray* (1).

Now the innuendo in the passages complained of is perfectly clear. The public are told that the general impression is that the accused are innocent, that, instead of extorting thirteen annas from the Bhangi, they received the amount as a voluntary contribution, that the liquor contractors and the Police are colloborating in the prosecution, that the trying Magistrate is taking his orders from the Collector, and in his conduct of the trial is acting with great favouritism towards the Police and with gross partiality against the accused. It is not difficult to imagine what the result of such comments would be among the public in times of political excitement. They would be induced to think, if the accused were convicted, that they had been denied the essentials of a fair trial, and that the Court, whose function it was to render justice to all who might appear before it, had been prostituted to procure the conviction of innocent men in order to gratify the avarice of the liquor contractors.

The respondent says in his affidavit by way of explanation:—

"In publishing the article complained of I had no desire or intention in any way to interfere with or obstruct the due course of administration of justice or in any way to prejudice the fair trial of the case. I wrote the article in the discharge of what I believe to be my duty as a journalist believing in good faith that I was entitled to do so having regard to the fact that the case was regarded on all hands to be one of public interest and importance. I may add that I have all along believed that it is open to a journalist in the discharge of his duties to offer fair and legitimate comments on all matters affecting the public interest and that in the publication of the article in question I was actuated by no other motive or desire whatever than that of doing my duty to the public as a journalist by offering fair comments on matters of urgent public interest.

If this Hon'ble Court is, however, of opinion that even the mere publication of comments on proceedings pending in the Court of a subordinate Magistrate amounts in law to a contempt of Court of which this Hon'ble Court will be entitled to take notice, I am willing to abide by this Hon'ble Court's ruling on the point and to express my sincere regret for having published the article in ignorance of the law governing the publication of such comments."

The respondent is a pleader of mature age and his affectation of ignorance of the law with regard to a journalist's right to comment on pending judicial proceedings can be accepted at its true value.

With regard to his allegations against the Magistrate the respondent says:—

"I fully believed in the truth of the statement when I published the same on the strength of a thick rumour which I had myself heard and which was confirm-

(1) (1900) 2 Q.B. 36=82 L.T. 534=69 L.J.Q.B. 502=64 J. P. 484.

tively. But the evidence is unsatisfactory and no reliance can be placed on it. There is no writing about the debts and such oral evidence can be prepared at any time."

On reading the evidence admittedly adduced to prove the payments, there can be no doubt that the learned Judge was right in his appreciation of it. Because the sale-deed passed thirty years ago by a Hindu widow to an outsider could not be attacked until the death of the widow, it may seem hard that the defendant purchaser should be deprived of this property. But still the law in this country is perfectly well known that a widow cannot sell more than her own interest unless there is legal necessity, and the *onus* has rightly been placed on the purchaser to prove that the sale was for necessity.

Therefore, it was desirable that at any rate the debts which it was suggested were paid off out of the purchase price should have been recited in the deed and it was not sufficient that there should be merely a recital that the property had been sold for debts. The learned Judge pointed out:—

"There is absolutely nothing to show that Daji was really indebted. He possessed considerable land, both at Delada and Dholgam. It is probable that the suit lands were sold because the widow who resided at Dholgam could not manage them. On the evidence I am not prepared to hold that the sale was for necessity."

In any event it is impossible to come to the conclusion that the learned Judge was wrong in his appreciation of the evidence. The defendant has also failed to prove that his father spent about a thousand rupees on improvements as alleged in this case, and as the revenue of the land is said to be Rs. 320 a year, we think the defendant must have recouped the money which his father spent in purchasing the property with interest thereon.

The appeal fails and must be dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 52.

MACLEOD, C.J. AND SHAH, J.

Emperor—Applicant

v.

Balkrishna Govind Kulkarni—Respondent

Criminal Application for Revision No. 211 of 1921, decided on 28th September, 1921, from an order by the Government of Bombay.

Penal Code, S. 228—Complaint pending before Magistrate—Comments in the newspaper—Reflecting on impartiality of Magistrate is contempt of Magistrate's Court—Contempt of lower Court may be contempt of High Court—Contempt.

Comments in a publication reflecting on the character or impartiality of the Magistrate in the course of the criminal trial, tend to deprive the Court of the power of doing that which is the end for which it exists, *i.e.*, to administer justice duly and impartially, and constitute necessarily a contempt of the Magistrate's Court [P. 53 ,C. 1.]

Per Macleod, C. J.—It is not that every contempt of an inferior Court is necessarily a contempt of High Court. It is a question which must be decided on the facts of each case. If the publication of the remarks in an article impedes the due administration of justice, it constitutes a contempt of High Court and it has jurisdiction and powers to deal with it as the King's Bench Division in England has [P. 62, C. 1, 2.]

Per Shah, J.—The High Court has no power to punish contempts of Criminal Court subordinate to it as the King's Bench has.

[P. 63, C. 2; P. 64, C. 2.]

G. N. Thakor and *H. B. Gumaste*—for Respondent.

Bahadurji with *S. S. Patkar*—for the Crown.

Macleod, C. J.:—This is a rule granted at the instance of the Government of Bombay calling upon Balkrishna Govind Kulkarni, Editor and Publisher of the *Shubhodaya* newspaper at Dharwar to show cause why he should not be committed for contempt of Court in respect of the publication of an article commenting on the proceedings in the Court of the First Class Magistrate at Dharwar against two volunteers of the Temperance Committee who were alleged to have extorted some money from a *Bhangi*.

The article commences:—

"Proceedings have been instituted against two volunteers of the Temperance Committee for the alleged extortion of thirteen annas and the hearing commenced ten days back. . . . The Police have appointed to conduct the case one of their inspectors who merely does what he is asked to do by the police and echoes them and earns his pay without any trouble. Every one in the town seems to be under the impression that the complainants voluntarily paid the fine and that the case owes its origin to the

pressure of the liquor contractors who desire to make fortune by selling toddy. Moreover there is a thick rumour that on the day on which the volunteers were arrested the trying Magistrate ran up the staircase of the Collector's Office and called on Mr. Painter and that some whisper took place between them. Again Police Sahebs sit in chairs on the Magistrate's dais and wink (at each other). The chief complainant is a Bhangi under the District Superintendent of Police who receives his pay from the Police Department."

There are further allegations that the District Police Superintendent was speaking in the middle when witnesses were being examined; that when the pleader for the accused observed that it was right that co-witnesses should be examined on the same day or else there was fear of the Police tutoring, the Court adjourned the hearing one hour earlier than the hour of closing of the Court prescribed by law; that although the evidence of the witnesses had been satisfactory, the accused were not enlarged on bail.

It can hardly be disputed that these remarks constitute a very gross contempt of Court.

In the first place such comments, while proceedings are pending in a Court of law tend to deprive the Court of the power of doing that which is the end for which it exists, to administer justice duly impartially, and with reference solely to the facts brought before it. Secondly, any remarks reflecting on the character or impartiality of the Magistrate in the course of the trial must necessarily be contempt: *Reg.* v. *Gray* (1).

Now the innuendo in the passages complained of is perfectly clear. The public are told that the general impression is that the accused are innocent, that, instead of extorting thirteen annas from the Bhangi, they received the amount as a voluntary contribution, that the liquor contractors and the Police are colloborating in the prosecution, that the trying Magistrate is taking his orders from the Collector, and in his conduct of the trial is acting with great favouritism towards the Police and with gross partiality against the accused. It is not difficult to imagine what the result of such comments would be among the public in times of political excitement. They would be induced to think, if the accused were convicted, that they had been denied the essentials of a fair trial, and that the Court, whose function it was to render justice to all who might appear before it, had been prostituted to procure the conviction of innocent men in order to gratify the avarice of the liquor contractors.

The respondent says in his affidavit by way of explanation:—

"In publishing the article complained of I had no desire or intention in any way to interfere with or obstruct the due course of administration of justice or in any way to prejudice the fair trial of the case. I wrote the article in the discharge of what I believe to be my duty as a journalist believing in good faith that I was entitled to do so having regard to the fact that the case was regarded on all hands to be one of public interest and importance. I may add that I have all along believed that it is open to a journalist in the discharge of his duties to offer fair and legitimate comments on all matters affecting the public interest and that in the publication of the article in question I was actuated by no other motive or desire whatever than that of doing my duty to the public as a journalist by offering fair comments on matters of urgent public interest.

If this Hon'ble Court is, however, of opinion that even the mere publication of comments on proceedings pending in the Court of a subordinate Magistrate amounts in law to a contempt of Court of which this Hon'ble Court will be entitled to take notice, I am willing to abide by this Hon'ble Court's ruling on the point and to express my sincere regret for having published the article in ignorance of the law governing the publication of such comments."

The respondent is a pleader of mature age and his affectation of ignorance of the law with regard to a journalist's right to comment on pending judicial proceedings can be accepted at its true value.

With regard to his allegations against the Magistrate the respondent says:—

"I fully believed in the truth of the statement when I published the same on the strength of a thick rumour which I had myself heard and which was confirm-

(1) (1900) 2 Q.B. 36=82 L.T. 534=69 L.J.Q.B. 502=64 J. P. 484.

ed by information of a definite nature personally conveyed to me by a gentleman in Government service in whom I confided and whom I had no reason to disbelieve. Being however a Government servant the gentleman is not now prepared to back me up by his affidavit and it would on my part also involve a breach of journalistic etiquette to disclose his name...Now that I find that the fact alluded to by me is denied on oath by the learned Magistrate and that the matter is not within my personal knowledge. I feel it to be the more honourable course for me to withdraw the same and also to express my sincere regret for having published the same."

The question for decision is whether the High Court of Bombay has jurisdiction to deal with a person who has been guilty of contempt of a Court in the mofussil subordinate to the High Court. In *In re M. K. Gandhi* (2) the respondents were charged with contempt of the High Court for publishing a certain letter which formed part of the record of proceedings then pending in the High Court; but incidentally some of the comments complained of reflected on the District Judge of Ahmedabad and it appears to have been accepted by the learned Judges that the High Court could have jurisdiction to deal with contempts of the mofussil Courts.

However the question was not seriously argued, no Indian cases were cited and that expression of opinion cannot be considered as binding upon us. It is sufficient to say that at that time it did not occur to the learned Judges that such jurisdiction might be disputed. Marten, J. said (p. 378) :—

"It makes no difference, I think, that the alleged abuse here was of a District and not of a High Court Judge. *Rex* v. *Davies* (3) shows that in England the High Court has power to protect the Courts of inferior jurisdiction and that in a proper case it should do so. I think the same power exists in India, and that subject to the precautions which Lord Russel mentions (*Reg* v. *Gray*) (1) this Court should extend its protection to all Courts in the mofussil, over which it exercises supervision."

Hayward, J. said (p. 381) :—

"A contempt of Court of a more serious nature was, in my opinion, committed in commenting in the particular manner on that letter. It amounted clearly to 'scandalising' Mr. Kennedy as District Judge...It was Mr. Kennedy's duty to report the matter in question as District Judge for the orders of the High Court. It has become our duty to protect the proceedings of the District Judge under the powers shown by the precedents of *Rex* v. *Parke* (4) and *Rex* v. *Davies* (3) to be vested in us as Judges of the High Court."

See also *Hassonbhoy* v. *Cowasji Jehangir Jassawalla* (5) where West, J., in dealing with the powers of the High Court to commit for contempt, said at p. 4 :—

"Such a power indeed must exist somewhere in order to secure the administration of the law, and it can be safely restricted in the case of the lower Courts only because it is held and exercised by those to which they are subordinate."

The first direct Indian authority on the question is *In re Venkat Rao* (6.) An injunction order was passed by the District Munsiff of Bellary against Venkatrao, a pleader, in a pending suit. While proceedings were pending against him for disobedience to the injunction order, the Munsiff was served with notice of suit for damages in respect of the injunction proceedings.

It was alleged in the notice that the Munsiff had acted maliciously and without reasonable cause and in furtherance of the ill-will he bore the respondent. At the hearing of the motion for contempt, made at the instance of the Advocate-General, counsel for the respondent tendered an apology and said he was not going to argue the question of jurisdiction. However, he was allowed to argue the question as *amicus curiæ*. The Chief Justice, in giving judgment, said (p. 838):—

"It seems to me that there are two questions for us to consider. First have we inherent Common Law jurisdiction in the matter? And, secondly, have we statutory jurisdiction under the powers conferred on this Court by Section 15 of the High Courts Act?"

What was the Common Law of England with regard to the powers of the King's Bench Division of the High Court in England with reference to contempt committed of inferior Courts has been

(2) (1920) 22 Bom. L. R. 368=58 I. C. 915.
(3) (1906) 1 K. B. 32=93 L. T. 772=22 T. L. R. 97=75 L. J. K. B. 104.
(4) (1903) 2 K. B. 432=89 L. T. 439=72 L. J. K. B 839=67 J. P. 421.
(5) (1883) 7 Bom. 1.
(6) (1911) 21 M. L. J. 832=12 I. C. 293=10 M. L. T. 209.

decided in *Rex* v. *Parke* (4) and *Rex* v. *Davies* (3) and the latter decision makes it clear that the King's Bench has jurisdiction to commit for contempt of an inferior Court, even if the inferior Court was dealing with a case which would not be taken to a tribunal which was a branch of the High Court. After discussing these cases and the argument that there might be a distinction between cases of contempt of an inferior civil Court and contempt of an inferior criminal Court the Chief Justice came to the conclusion that as the Privy Council had decided that the High Court had the inherent Common Law powers in connection with matters of contempt which were exercised by the old Court of King's Bench and now by the King's Bench Division and, as the King's Bench Division had powers to commit for contempt of inferior Court, the High Court had the same jurisdiction. But the Chief Justice was not prepared to hold that jurisdiction was given by Section 15 of the Indian High Courts Act which gave powers of superintendence with regard to subordinate Courts.

In *Rex* v. *Parke* (4) a person having been charged before the Petty Sessions with an indictable offence triable only at the assizes, matter was published in a newspaper tending to interfere with the fair trial of the charge. It was held that the High Court had jurisdiction to attach the publisher for contempt notwithstanding that at the time of publication the person charged had not been seen committed for trial.

It was argued that there was no jurisdiction because at the time of publication of the articles complained of there were no proceedings actually pending in any Court but the Petty Sessional Court, that the jurisdiction was confined to cases in which at the time of publication there was some cause actually pending in the High Court, and the High Court could not deal by way of attachment for contempt with interferences with the due course of justice in any Court other than itself.

On this Wills, J. said (p. 436):—

"It may be conceded that the jurisdiction to commit for contempt of Court is confined to contempt of the Court exercising the jurisdiction. Upon the wider and more general question, whether this Court will treat in this fashion inroads upon the independence of inferior Courts, we propose to say a few words towards the close of the judgment. As far as the present case is concerned it does not seem to us to arise. By the Judicature Act the Court of a commissioner of assize is made a branch of the High Court. The crime of which Dougal was accused could not in the regular course of things be tried anywhere but at the assizes. It has been argued, that publication of articles of the kind in question cannot be treated as a contempt of the Assize Court unless the committal has actually taken place and a bill been found, when only, it is urged, is there a case pending in the Assize Court, and when it is also urged the jurisdiction ought to be exercised by that Court itself.

A moment's consideration is sufficient to dispose of such a proposition. The wrong can hardly be the less because the purpose or the tendency of the act complained of is that the Assize Court never shall have undisturbed power to fulfil its functions satisfactorily. The High Court exists always. To provide beforehand that one of its branches which, although it does not at the moment exist, yet must both according to immemorial custom, and now also by statutes and rules having the same effect, come into existence, shall be hampered and hindered in the effectual discharge of its duties as soon as it is constituted, if called upon to try a particular case which it is at all events proposed to bring into that Court, is surely an offence against the High Court itself."

Then, after discussing the precedents, the learned Judge proceeded at p. 442 :—

"For what they are worth, they tell rather against than for the general jurisdiction of this Court to protect inferior Courts from attacks of this kind on their independence and usefulness. On the other hand, very serious and important considerations tend the other way. Many inferior tribunals are not Courts of Record, and, therefore, have no means of checking practices the kind with which we are dealing. This Court exercises a vigilant watch over the proceedings of inferior Courts, and successfully prevents them from usurping powers which they do not possess, or otherwise acting contrary to law. It would seem

almost a natural corollary that it should possess correlative powers of guarding them against unlawful attacks and interferences with their independence on the part of others. But we purposely abstain from pronouncing any opinion upon this general question and prefer to leave it entirely open when the occasion shall arise, and at the present moment confine ourselves to saying with Wright, J., that we should hesitate long before casting any more doubt than may already exist upon the capacity of this Court to deal by proceedings for contempt with cases in which attempts are made to pollute the stream of justice, and to interfere with its proper and unfettered administration by Courts which possess no adequate means of protecting themselves."

The occasion arose in *Rex* v. *Davies* (3), where remarks had been published in a newspaper tending to interfere with the fair trial of a person charged at the Petty Sessions with an indictable offence triable either at the assizes or at quarter sessions. The Court had held that the decision in *Rex* v. *Parke* (4) was applicable. But as a further question of great and growing importance, namely, the jurisdiction of the High Court to treat attacks of that kind upon the independence and usefulness of inferior Courts as offences to be dealt with *brevi manu* by the High Court in its summary jurisdiction it was considered desirable to treat the case as if a committal had actually taken place to quarter sessions which was not a branch of the High Court.

Wills, J. first referred to passages in Lord Coke's Institutes and Hawkins' Pleas of the Crown to show the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior Courts and that it was in a special manner the guardian and protector of public justice throughout the kingdom.

The same may be said of this High Court with regard to the Presidency proper of Bombay. Then the learned Judge asked what was the principle which was the root of and underlay the cases in which persons had been punished for attacks upon Courts and interferences with the due execution of their orders. He said at p. 40:—

"It will be found to be, not the purpose of protecting either the Court as a whole or the individual Judges of the Court from a repetition of them, but of protecting the public, and specially those who either voluntarily or by compulsion, are subject to its jurisdiction from the mischief they will incur if the authority of the tribunal be undermined or impaired; see the judgment prepared by Wilmot, C. J. in *Rex* v. *Almon* (7) but not delivered because the case was allowed to drop. Wilmot's Opinions, p. 256.

"The word 'authority' is used by him to express 'the deference and respect which is paid' to the Judges of Courts and their acts 'from an opinion of their justice and integrity.' These words are apt with respect to the particular case with which he was dealing. But what possible difference in the principle can there be in respect of direct attacks upon Courts or Judges, and of writings, the tendency of which is to deprive the inferior Courts beforehand of the possibility of doing even-handed and impartial justice according to the due course of law.

"To hold that there was a distinction would give colour to the notion, which cannot be too strongly repudiated, that the offended dignity of a particular Court, or of the persons who compose it, is the subject of punishment in such a case. 'The object of the discipline enforced by the Court in case of contempt of Court,' says Bowen, L. J. 'is not to vindicate the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice': *Helmore* v. *Smith* (8) and a considerable part of the undelivered judgment of Wilmot, C. J. to which we have referred is devoted to showing that the real offence is wrongly done to the public by weakening the authority and influence of a tribunal which exists for their good alone.

"Attacks upon the Judges," he says, "excite in the minds of the people a general dissatisfaction with all judicial determinations, and whenever men's allegiance to the laws is so fundamentally shaken it is the most fatal and dangerous obstruction of justice, and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges as private individuals but because they are the channels by which the King's justice is

(7) (1770) 5 Bur. 2686=98 E. R. 411.
(8) (1886) 56 L. J. Ch. 145=35 Ch. D. 449=56 L. T. 72=35 W. R. 157.

conveyed to the people. To be impartial and to be universally thought so are both absolutely necessary for the giving justice that free, open, and unimpaired current which it has for many ages found all over this Kingdom': Wilmot's Opinions, pp. 255, 256. With a few verbal alterations those eloquent words will apply with at least equal force to writings the direct tendency of which is to prevent a fair and impartial trial, or at least one that can be so considered, from being had in Courts of inferior jurisdiction which have not the power of protecting themselves from such encroachments upon their independence. The public mischief is identical, and in each instance the undoubted possible recourse to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy."

At p. 42 the learned Judge refers to the great principle that Courts or the administration of justice exist for the benefit of the people, that for the benefit of the people their independence must be protected from unauthorised interference, and that the law provides effective means by which this end can be secured:—

"If it is to be secured at all in the case of the inferior Courts it can only be secured by the action of this Court, for they have not the power to protect themselves; and if it be true that the King's Bench is in any sense the *custos morum* of the Kingdom, it must be its function to apply with the necessary adaptations to the altered circumstances of the present day the same great principles which it has always upheld."

The learned Judge then points out the essential difference between the jurisdiction exercised by the Courts of King's Bench and that of the other Courts which possessed none of the relations with the inferior Courts which have always appertained to the King's Bench, 'whose peculiar function it was to exercise superintendence over the inferior Courts and confine them to their proper duties and continues (p. 43):—

"This, however, as it seems to us, was only one exercise of the duty of seeing that they did impartial justice, and if and when the attainment of that end required that the mis-deeds of others should be corrected as well as the misfeasances of the inferior Courts themselves, it seems to us that it is no departure from principle, but only its legitimate application to a new state of things, if others whose conduct tends to prevent the due performance of their duties by those Courts have to be corrected as well as the Courts themselves."

Then after discussing the authorities learned Judge says (p. 47):—

"It appears to us that the state of the authorities, such as they are, is such as to leave the question, as was pointed out in *Rex* v. *Parke*, (4) entirely open for our decision. Our attention has been called to observations of Sir George Jessel, M. R. in *In re Clements*, (9), as to the necessity of caution in dealing with a matter where the liberty of the subject is concerned. Such considerations have been fully present to our minds, and certainly needed no authority to enforce them. It is because we think that we are creating no new jurisdiction, but acting strictly in conformity with the cardinal principles upon which the jurisdiction to commit for conduct tending to improperly interfere with the administration of justice rests, that we have come to the conclusion at which we have arrived. To confine the application of such principles to facts identical with or closely resembling those of preceding cases, and to hold that, because in times long gone by the chief, if not the only danger to be guarded against, was the illegal exercise of arbitrary power by inferior Courts and their officers, therefore the power of this Court extends no further, and that the King's Bench cannot afford them protection as well as administer correction, would, we think, be to mistake the application of the principle for the principle itself.

"The mischief to be stopped is in the case of the inferior Courts identical with that which exists when the due administration of justice in the superior Courts is improperly interfered with. The reason why the Court of King's Bench did not concern itself with contempts of the other superior Courts was that they possessed ample means and occasions for protecting themselves. Inferior Courts have

(9) (1877) 46 L. J. Ch. 375=36 L. T. 332.

not such powers, although some of them, quarter sessions for example, try many more cases than are tried at assizes, and have a very extended and important jurisdiction. The danger is perhaps greater to them than it is to the superior Courts of having their efficiency impaired by publications such as those which have given rise to the present proceedings. Thinking as we do that the application now before us asks for nothing more than the legitimate application to new circumstances of the old principles of the Common Law, we have come to the conclusion that we ought to grant the remedy invoked, and it remains only to consider the penalty that ought to be inflicted."

Davies was fined £ 100 and costs.

I need make no excuse for citing at so great a length from this judgment, as otherwise it would not have been possible to realise the foundations on which it rested. The administration of justice is for the benefit of the people, therefore any unauthorised interference with the administration of justice is against the interests of the people.

The inferior Courts cannot protect themselves against such interference, but as it is the duty of the King's Bench in exercise of its powers of superintendence to see that the inferior Courts do impartial justice and if necessary correct their misfeasance so it is also the duty of the King's Bench to correct the misdeeds of others which tend to prevent the due performance of their duties by the inferior Courts. And the key of the whole argument will be found when the learned Judge points out that whether the administration of justice by the inferior Courts or by the superior Courts is interfered with the mischief is identical.

It seems to me, moreover, that every word in that judgment is applicable to the case before us.

This High Court possesses the same powers of punishing for contempt as the Court of King's Bench by virtue of the Common Law of England. It has powers of superintendence over all the Courts, civil and criminal, in the Presidency proper and it may be noted that in this case an application has already been made to this Court to exercise its revisional powers on behalf of the accused, and by virtue of its Charter it can withdraw to itself any case, civil or criminal, pending in any of the Courts subordinate to it. It is responsible for the administration of justice not only by itself but also by all the inferior Courts, and as it is its duty to see that those Courts do not exceed their powers, I should have thought it must also be its duty to see that there is no improper interference by others which may prevent those Courts from properly exercising their powers, and therefore if the duty lies at Common Law, the power to enforce its orders must also exist at Common Law.

However, the contrary view has been expressed by the High Court of Bengal in *Legal Remembrancer* v. *Motilal Ghose* (10) and it will be necessary to consider the judgments which cover over sixty printed pages at some length. The facts were that while proceedings, in what was known as the Barisal Conspiracy Case, were going on in the Court of the Additional District Magistrate at Barisal, various articles appeared in the *Amrit Bazar Patrika*, a paper published in Calcutta, containing comments on the proceedings.

It was contended that the publication of these articles tended to interfere with the due course and administration of justice. Jenkins, C. J. said:—

"Have we jurisdiction to commit for contempt of an inferior Criminal Court? The question is one of considerable difficulty and cannot, as seemed to be supposed, be solved or even understood by a mere perusal of the decision in *Surendra Nath Banerjee* v. *Chief Justice and Judges of the High Court* (11) and *Rex* v. *Davies* (3). To determine the High Court's jurisdiction in this matter involves an enquiry into its constitution and the jurisdiction, power and authority it has inherited, or may otherwise possess."

The High Court inherited all jurisdictions and every power and authority in any manner vested in the Supreme Court, the Sudder Diwani Adawlat and the Sudder Nizamut Adawlat. The Supreme Court established by Charter in 1774 was thereby constituted a Court of Record, but it had no general control or power over the mofussil Criminal Courts. The

(10) (1913) 41 Cal. 173=20 I.C. 81=17 C.W. N. 1253.

(11) (1883) 10 Cal. 109=10 I. A. 171=4 Sar. 474 (P. C.).

Sudder Diwani Adawlat whose jurisdiction was civil, was under 21 Geo. III, c. 70, Sec. 21 constituted a Court of Record. The Sudder Nizamut Adawlat did not appear to have been even constituted a Court of Record and therefore it had no power to commit for contempt of an inferior Court which could only punish under Act XXX of 1841 contempts committed in the face of the Court. The Chief Justice then, after concluding that the High Court could not have inherited the jurisdiction from either of these abolished Courts, considered whether the jurisdiction could have become vested in it by the Charter Act, 1861, or the Letters Patent under that Act and whether the decision in *Rex* v. *Davies* (3), was applicable.

Analysing the judgment in that case the Chief Justice points out that the jurisdiction assumed was inherited from the old King's Bench and was of a special character as it rested on that Court's power to punish every kind of misdemeanour as the guardian and protector of public justice throughout the kingdom, the '*custos morum*' a dignity that reverted to it or was revived after the abolition of the Star Chamber.

The helplessness of the inferior Court and its subjection to the superintendence and control of the King's Bench were not the foundations of the jurisdiction but merely the occasion and the reason for its exercise. The Court considered that the proceedings before it were the legitimate application to new circumstances of the old principle of the Common Law, and according to those principles the King's Bench as *custos morum* had jurisdiction to punish on a summary proceeding as well as on indictment or information all offences in the kingdom being a contempt of Court as tending to interfere with the administration of justice, when the Court embarrassed was under the superintendence of the King's Bench and unable to protect itself. Common Law principles should be applied on a summary proceeding.

Had the High Court Common Law powers to punish as an offence on a summary proceeding conduct in relation to a proceeding in a mofussil Court which was not an offence under the Indian Penal Code, and which could only be considered as a contempt of the mofussil Court? As superintendence did not give jurisdiction to the King's Bench, powers to punish for interference with the lower Courts did not arise from its being a Court of Record but from its Common Law powers as *custos morum*, which the High Court did not possess, it followed that the High Court had not the jurisdiction which was sought for it.

The learned Chief Justice refrained from commenting on the decision in *Venkat Rao's case* (6), on the ground that to appreciate the *ratio decidendi* it would be necessary to possess an intimate acquaintance with the nature and limits of the jurisdiction of the High Court of Madras inherited from its predecessor or vested in it by its Charter. He had none of the materials necessary for that purpose nor could he tell how far the Common Law prevailed in the Madras Presidency outside the Presidency town. But with all due respect, the *ratio decidendi* in *Venkat Rao's case* (6), is perfectly clear for the Chief Justice of Madras did not go beyond the decision of the Privy Council in *Surendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court* (11), to the effect that the High Courts in the Presidencies were superior Courts of Record and their power of punishing for contempt was the same as in England by virtue of the Common Law of England.

Then as the King's Bench had the power to punish for contempt of Court involved in the interference with the administration of justice by an inferior Court it was inferred that the High Court of Madras had the same power. If there was jurisdiction in the High Court to deal with contempt of an inferior Court it did not much matter if the jurisdiction was exercised on the ground that the contempt of the inferior Court amounted to a contempt of the Court exercising jurisdiction. The cause of the difference of opinion between the Chief Justices of Bengal and Madras is obvious.

The argument of Jenkins, C. J. is as follows: The King's Bench had jurisdiction to punish on a summary proceeding all contempts of Court, by virtue of its position as *custos morum*, not because it was a Court of Record. The other superior Courts were Courts of Record but had no power to punish for contempts which 'did not tend to interfere with the administration of jus-

tice by such Courts. The High Court of Bengal was in no better position than the English Superior Courts other than the King's Bench and therefore had no jurisdiction to punish for contempts of other Courts.

White, C. J., on the other hand, argued, the High Court of Madras is a Court of Record, it has also powers of superintendence over the inferior Courts as the King's Bench has, and consequently the High Court has jurisdiction to punish contempts which tend to interfere with the administration of justice whether by the inferior Court or by the High Court itself. He did not think the High Court had jurisdiction under Section 15 of the Indian High Courts Act.

That may be so but I do not think that the learned Chief Justice can be taken as holding that if the High Court of Madras was only a Court of Record with no powers of superintendence over the mofussil Courts, it would have had jurisdiction to punish contempts which were directed in the first instance against the mofussil Courts. For he especially refers to the passage in *Rex* v. *Parke* (4) to the effect that the power of guarding the inferior Courts against unlawful attacks was the natural corollary of the power of superintendence. Again, in the Barisal case, the contempt alleged was treated in the first instance as a contempt of the Barisal Court, and not of the High Court.

White, C. J. considered that a matter of academical interest, but it is much more than that, when a question of logical accuracy is involved. For in *Rex* v. *Parke* (4) Wills, J. conceded that the jurisdiction to commit for contempt was confined to contempt of the Court exercising jurisdiction and there is nothing in the judgment in *Rex* v. *Davies* (3) delivered by the same learned Judge which would lead one to think that what had been conceded in *Rex* v. *Parke* (4) was withdrawn in *Rex* v. *Davies* (3).

Jenkins, C. J., no doubt did consider the question whether the High Court could deal with the contempt alleged on the ground that the case might come before it either for original or appellate trial at one stage or another but declined to express any opinion on the point on the ground that it had not been discussed in the argument. And, after discussing the articles complained of, the Chief Justice says (p. 220) :—

"The conclusion then to which I come is, that though we may have jurisdiction to commit for contempt of the High Court in a case of this class, still in the present case no contempt justifying summary action on our part has been established."

Stephen, J., after discussing *Rex* v. *Parke* (4) and *Rex* v. *Davies* (3) came to the conclusion that the latter decision depended on general powers possessed by the King's Bench to secure a proper administration of justice to His Majesty's subjects which the learned Judge could not find to have been conferred upon the High Court, so that it was impossible to hold that their powers of superintendence implied any power of protection. But the learned Judge discussing what might happen if the case came before the High Court on appeal continued (p. 230):—

"As a matter of principle it seems to me undeniable that we have a right to treat as a contempt any act committed within the local limits of our original jurisdiction that may affect its trial on appeal and in particular any act that may tend either to taint or impair that evidence or to cause evidence that would otherwise be forthcoming to be withheld."

However, on a review of the articles complained of the learned Judge considered that there was no contempt, however widely the law of contempt might be stated. The decision of the Madras High Court was not discussed. Mookerjee, J. considered that there was no foundation laid by the Crown for the theory that the High Court as a Court of Record had authority to punish for contempt of the Court of the Magistrate of Barisal merely because the High Court was a Court of Record which exercised powers of superintendence over that Court or because that Court was subject to its appellate and revisional jurisdiction.

The hypothesis that a superior Court which exercised a power of superintendence over a subordinate Court possessed by implication a power to afford to such Courts protection against contempts of its authority, was no doubt attractive but had no solid foundation in the history of the constitution of their Courts. In dealing with *Venkat Rao's case* (6) the learned Judge said (p. 248):—

"The proposition that the High Court in so far as it has inherited the

jurisdiction of the abolished Supreme Court possesses inherent Common Law powers in connection with matters of contempt which were exercised by the Court of King's Bench, is of no assistance in the solution of the problem now before us, namely whether the High Court as a Court of Record can punish for contempt of a subordinate Court over which it exercises powers of superintendence and which is subject to its appellate and revisional jurisdiction.

The fundamental distinction between the two questions is easily realised from an examination of the decision in *Rex* v. *Davies*, upon which the Advocate-General relies as the learned Judges of the Madras High Court did in *In re Venkat Rao* (6)."

The conclusion in *Rex* v. *Davies* (3) was not based on the ground that the King's Bench Division possessed the powers merely because it was a Court of Record or because it exercised powers of superintendence over inferior Courts, but was founded on a historical consideration of the supreme place in the judicature assigned to the Court of King's Bench which had power to correct errors and misdemeanours extra-judicial tending to the breach of the peace or oppression of the subjects or any other manner of misgovernment, and was in a special manner the guardian and protector of public justice throughout the kingdom.

The learned Judge thought it was obvious that those considerations of a very special character had no application to the High Court of Bengal and if they were to apply the principle which lay at the foundation of the decision in *Rex* v. *Davies* (3) they would have to hold that the Common Law of England was applicable throughout the jurisdiction of the Court even to persons other than British subjects beyond what was the territorial limit of the ordinary jurisdiction of the abolished Supreme Court. On a review of the articles complained of the learned Judge thought that they did not constitute a contempt of Court of the Magistrate of Barisal much less of the High Court.

The fact that none of the learned Judges considered that the articles complained of constituted a contempt had no doubt some influence on their judgments and the Chief Justice certainly refrained from holding that in no case of that class could a contempt of the High Court be committed. Although the question of the jurisdiction of the King's Bench was not decided until 1906 the effect of the decision in *Rex* v. *Davies* (3) was that according to the Common Law of England the King's Bench always had jurisdiction to deal with contempts of inferior Courts which by tending to interfere with the due administration of justice constituted contempts of the King's Bench.

It would follow that the Supreme Court by its Charter had the same jurisdiction to the extent of its territorial limits. If those limits had been extended to the Presidency proper, its jurisdiction in matters of contempt would have extended in the same way, and because the Supreme Court was abolished and the territorial limits of the High Court which took its place were extended by the same measure which brought it into existence, there is no reason why its jurisdiction in matters of contempt should be restricted to the territorial limits of the old Supreme Court. Of course by territorial limits I mean the limits within which the High Court exercises appellate and revisional powers and powers of superintendence.

It is true that the powers of the High Courts to correct errors and misdemeanours are defined and limited by Statute, but the power to punish for contempt remains as given to it by the Common Law.

I entirely agree with Mookerjee, J. when he says at p. 260 :—

"The power must be exercised with caution and only when the case is clear beyond controversy, because as Sir George Jessel observed in *Plating Company* v. *Farquharson* (12) it is an arbitrary jurisdiction. There is no limit to the amount of the fine which may be inflicted or to the length of the term of imprisonment which may be directed; there is no appeal as a matter of right against an order of attachment. It is the only criminal offence summarily punishable. The Court will consequently not make an order for attachment, unless it is satisfied beyond dispute that the order is needed peremptorily in the interests of the administration of justice."

The learned Judge refers to what historians have recorded as the policy of the Emperor Augustus in dealing with such matters but I think that in

(12) (1881) 17 Ch. D. 49=50 L. J. Ch. 406=44 L.T. 389=45 J. P. 468.

deciding whether or not to take notice of contempts the consideration which might have influenced a Roman Emperor in exercising leniency or passing them by unnoticed would have to be re-valued by the Courts according to modern circumstances.

We are not concerned with the fact that there are other Courts of highest jurisdiction in India which do not possess the Common Law powers of the King's Bench. We are only concerned to see that what jurisdiction the High Court possesses, so as to preserve the administration of justice pure and unobstructed for the benefit of the people of the Presidency proper, should be exercised as occasion demands with all due care and deliberation.

We must exercise the high functions entrusted to us according to due course of law, and I venture to think there is evidence, in the words of Mr. Justice Wills, to show the very great trust reposed in this Court in respect of its control and superintendence of all inferior Courts subordinate to it, and that it is in a special manner the guardian and protector of public justice.

It is by writings such as the one complained of in this case that the public mind is poisoned and their belief in the impartiality and incorruptibility of the Courts is sought to be destroyed, and we cannot fulfil that trust if the administration of justice can be interfered with without any power on our part to prevent it.

However desirable it might be that it should have that power, however attractive the hypothesis that the power of superintendence carries with it the power of protection, the High Court of Bengal can find no foundation in the history of its constitution for holding that it has that power. The High Court of Madras without considering its own history has boldly linked to a dictum of the Privy Council a modern decision which has discovered for the King's Bench its inherent powers to punish all attempts to interfere with the administration of justice.

I see nothing in the history of the constitution of this Court which should deter me from holding that we have the same powers of punishing for contempt as the King's Bench Division. The Supreme Court had the power but its jurisdiction in this respect was limited not by its constitution but by its geographical limits consequent on its being established by the Crown within the territories of the East India Company, for certain purposes, which left the jurisdiction and powers of the Company's Courts free from all constraint or superintendence by the Supreme Court. The jurisdiction of the Supreme Court to punish for contempt in cases of this class thus lying dormant of necessity was inherited by the High Court and although by virtue of its extended authority occasions might have arisen for its exercise, nearly sixty years have passed before even the question of its jurisdiction has come up for decision.

It is not every contempt of an inferior Court which will necessarily constitute a contempt of this Court. That is a question which must be decided in each case as it arises. Viewed in this light the question is not so much one of jurisdiction as one of fact, and I have sufficiently stated above the principles which I think should guide the Court in deciding the question of fact.

For myself I have no hesitation in holding that, according to those principles, in this case a contempt of this Court has been committed but I recognise that owing to the conflict of authorities on the question at issue the respondent may have thought that in publishing the article complained of he was in no danger of rendering himself liable to be attached in exercise of our summary powers.

Shah, J.:—This is a rule issued on the application of the Government of Bombay, against Balkrishna Govind Kulkarni, the Editor and Publisher of a paper, called the *Shubhodaya*, published at Dharwar to show cause why he should not be committed for contempt of Court. The contempt is said to have been committed by the publication of an article written in Kanarese, on the 2nd of June, 1921, in respect of certain proceedings then pending in the Court of the First Class Magistrate at Dharwar against two persons, who are described as "volunteers of the Temperance Committee," on a charge of robbery in respect of a sum of thirteen annas punishable under Section 392, Indian Penal Code.

It is not necessary to quote the article here. But the writer attributes partiality to the Magistrate in favour of the prosecution, criticises the proceedings in his Court in a manner which cannot

possibly be described as fair, and suggests that he acts under instructions of the District Magistrate and not in accordance with his own conscience.

The publication of such an article during the pendency of the proceedings is clearly improper. The effect of the article is to scandalise the Magistrate and its tendency is to interfere with an even and impartial administration of justice for which the Court is constituted.

It is clear that such a publication constitutes a contempt of that Court. It is to be regretted that such an article should have appeared in a newspaper edited and published by a person who holds a Sanad of this Court and who is expected to understand his responsibility in a matter of this kind. It is a matter of some satisfaction that the opponent has made no serious attempt to justify the article and has expressed his willingness to abide by the ruling of this Court and to express his 'sincere regret' for having published it as he says in ignorance of the law governing the publication of such comments.

The following observations in *Reg* v. *Gray* (1), appear to be applicable to this case (p. 40) :—

"Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

In the present case the article was published while the proceedings were pending and it is not suggested and cannot be suggested that it contains criticism of the nature indicated in the passage quoted above.

The questions that arise on this view of the article are (1) whether this Court has jurisdiction to punish the opponent for contempt of the Court at Dharwar, (2) whether it constitutes a contempt of this Court and (3) whether the opponent should be punished having regard to the circumstances of the case as disclosed in these proceedings.

As regards the first question at the outset, I may refer to the opinions expressed in *In re M. K. Gandhi* (2), on this point. If these opinions were binding upon us, without examining this somewhat difficult question, I would answer it in the affirmative in accordance with these opinions. But it appears that in that case the contempt under consideration was the contempt of this and not of a Subordinate Court, and that the question of jurisdiction which arises in this case did not arise in that case. The opinions expressed there were not strictly necessary for the decision of that case. Even then the opinions so clearly expressed are entitled to great weight.

Unfortunately, however, the particular point of law was not argued on both sides and apparently there was no reference to the Indian decisions on the point: nor is there anything in the judgment to show that the relevant provisions of the Statutes and the Letters Patent bearing on the point were independently examined. While, therefore, I am prepared to attach great weight to these opinions, I cannot say that I am relieved from the obligation of coming to an independent conclusion on the question of jurisdiction.

The two English decisions bearing on the point are *Rex* v. *Parke* (4), and *Rex* v. *Davies* (3), and the two Indian decisions are *In re Venkat Rao* (6), and *Legal Remembrancer* v. *Motilal Ghose* (10). The application of the view accepted in *Rex* v. *Davies* (3), to the Indian High Courts has been considered in both the Indian cases and the difficulty of the point is reflected in the conflicting decisions of the Madras and Calcutta High Courts.

I have carefully considered the point of jurisdiction in the light of the judgments in all these cases, and of the arguments urged before us. I do not think that this Court has power to punish contempts of criminal Courts subordinate to this Court as such.

This Court is undoubtedly a Court of Record. It has been so constituted by the Letters Patent of 1862 and 1865 and Section 106 of the Government of India Act of 1915, contains an express

provision to that effect. Having regard to its powers as defined by the Statutes and the Letters Patent it would be a superior Court of Record. Undoubtedly it would have the power to punish contempts committed against itself. The old Supreme Court as a Court of Record had that power ; but the old Sadar Diwani Adaulat and Foujdari Adaulat had no such power to punish persons for contempts.

The High Court has got all the powers which the above Courts had subject of course to the provisions of the Letters Patent. The High Court has also powers of superintendence over all the Courts within its appellate jurisdiction. It has been held that this Court has power to punish contempts committeed against itself as the superior Courts of Record have under the Common Law of England : *Surendranath Bannerjee* v. *Chief Justice and Judges of High Court of Bengal* (11). So far there is no difficulty.

But the question whether the Common Law of England is applicable so far as the punishability of contempts of subordinate Courts as such is concerned and whether the position of the High Court is the same as or similar to that of the Court of the King's Bench in England as regards the power to punish them are not free from difficulty and cannot be treated as settled by the above decision.

As regards the first point, certain contempts of Court are punishable at present under Section 228, Indian Penal Code, and apart from the usual remedy by way of trial Section 480 of the Code of Criminal Procedure provides a summary remedy for punishing them. The earliest legislation on this point, so far as I can gather, was Act XXX of 1841.

A careful perusal of these provisions shows that in India while certain contempts committed ' in view or the presence of the Court ' are made punishable, there is no provision in the Indian Penal Code or any other Indian Act for punishing such contempts committed in the absence of the Court as in the present case. It may be that the presiding Judge may be able to take proceedings in respect of a charge of defamation against the person concerned : but that is quite a different matter.

All that I mean is that a contempt of Court as such is not made punishable except to the limited extent indicated in Section 228, Indian Penal Code or Section 480, Criminal Procedure Code.

Under the English Common Law such contempts are punishable as misdemeanour, and the remedy is either by way of indictment or summary proceedings before the Court if it has the power to punish it summarily. I feel a great difficulty in holding that because a contempt of Court is punishable under the English Common Law it is punishable as such in India even though the Indian law does not make it punishable. It would be in effect creating a new offence to hold that a contempt of a subordinate Court as such is punishable.

Further, I am unable to hold that this Court has powers, which the King's Bench in England exercises under the Common Law of England, with reference to the contempts of other Courts. The provisions of the Statutes relating to the Indian High Courts, particularly Sections 9 and 15 of 24 and 25 Vic., c. 104, now replaced by Sections 106 and 107 of 5 and 6 Geo. V., c. 64 and of the Letters Patent of 1862 re-placed by the amended Letters Patent of 1865, particularly Clauses 21 to 28 relating to the criminal jurisdiction of this Court, clearly show that the jurisdiction and powers of the High Court are defined by and subject to those provisions and it is difficult to find either in the history of this Court or in the statutory provisions defining the limitations of the powers of this Court any justification for holding that this Court has powers such as the Court of the King's Bench in England has as being the *custos morum* of all the subjects of the realm under the Common Law of the land.

In the result I agree with the conclusion reached by Jenkins, C. J. in the Calcutta case that the High Court has no such power. I need not labour the point that the mere fact that the Court has powers of superintendence over the subordinate Court does not give to this Court any such jurisdiction, as both the Madras and Calcutta High Courts are agreed on this point.

I may add that the decision in *Rex* v. *Parke* (4) left this question open, and that the decision in *Rex* v. *Davies* (3) appears to me to be based upon the view that the Court of the King's Bench has power to punish *summarily* contempts of other Courts which are punishable by

the Common Law of the land, as being the *custos morum* of all the subjects of the realm. There it was merely a question of applying the remedy and not of considering the question whether the contempt was punishable by the law of the land.

The next question is whether the publication in question amounts to a contempt of this Court. The point is not distinctly raised in the petition, but in the argument it has been urged by the learned Advocate General that a contempt of a subordinate Court really constitutes a contempt of this Court. This question is by no means free from difficulty. On the best consideration that I can give to it I have come to the conclusion that it is not possible to lay down any general rule one way or the other. It cannot be said that every contempt of a subordinate Court is necessarily a contempt of this Court; nor can it be said that contempt of a subordinate Court can never be a contempt of this Court.

In each case it must be determined as a question of fact having regard to all the circumstances including the nature of the contempt, the nature of the proceedings with reference to which the contempt is committed, the relation of the subordinate Court to the High Court with reference to those proceedings and its probable effect upon the due administration of justice.

In the present case we are concerned with the contempt involved in the publication of the particular article in the *Shubhadaya* at Dharwar, with reference to proceedings in respect of a charge under Section 392, Indian Penal Code, in the Court of the First Class Magistrate at Dharwar. The article itself is an attack on the impartiality and independence of the Court. The proceeding was in respect of a charge triable by a First Class Magistrate. The charge of robbery is also triable by a Court of Session: but having regard to the description of the offences as given in the petition, I should treat these proceedings as a trial before that Court on the charge of robbery.

In such a case, in case of acquittal, the appeal would lie to this Court, and in case of conviction the appeal would lie to the Sessions Court, if the sentence be appealable; and in any event, in case of conviction this Court would have the power to revise the order of the Court in question, and the responsibility of this Court would be co-extensive with its revisional powers under the Code of Criminal Procedure. In thus stating the position, I have not referred to the other powers of this Court under the Letters Patent, the exercise of which can be hardly treated as anything more than remotely possible.

Looking at the article it is undoubtedly true that it is primarily directed against the Magistrate and not against this Court: and it is not unlikely that the publisher may not have been able to realise the possibility of its being treated as a contempt of this Court. At the same time it is clear that the attack on the impartiality and independence of the Magistrate was made at a time when the proceedings were pending: and the tendency of such publication is to impede the due administration of justice. At the same time without straining language it is not easy to say that such a contempt constitutes a contempt of this Court.

Generally speaking, I entirely disapprove of such attacks on the impartiality and independence of Judges, whatever their rank and position, particularly when the proceedings are pending: and I desire to express my complete agreement with the observations of Jenkins, C. J. in *Legal Remembrancer* v. *Motilal Ghose* (10) of the report, relating to the impropriety of making comments on pending cases or on judges in connection with these cases. Having regard to all the circumstances bearing on this question of fact I am not prepared to differ from the view which my Lord the Chief Justice takes that the publication of the article in question constitutes a contempt of this Court as tending to impede the due administration of justice.

This brings me to the last question as to whether the contempt is shown to be of such a character as to demand any punishment. In connection with this point, I think it must be shown that it was probable that the publication would substantially interfere with the due administration of justice. All the judges, who decided the case of *Legal Remembrancer* v. *Motilal Ghose* (10) have emphasised this point and having regard to the nature of this jurisdiction it must be exercised with reserve and caution,

I do not consider it necessary to elaborate this point in the present case. The petition is silent on this point. While the tendency of a publication may be clear, it may not be easy to determine its probable effect on the due administration of justice, which must necessarily depend upon the surrounding circumstances.

On the whole, I think, it is sufficient to warn the opponent on the ground that he has committed contempt of this Court.

Before parting with this case I may state that, in my opinion, such defects as exist at present in the law relating to contempts of Courts other than the High Courts can be removed only by Legislature and that it is desirable to remove them.

Opponent warned.

A. I. R. 1922 Bombay 66.

KINCAID, J.

Manubhai Premanund—Plaintiff

v.

Keshavji Ramdas—Defendant.

O. C. J. Suit No. 3511 of 1919, decided on 18th October, 1921.

Wagering contracts—Teji *and* mandi *explained and discussed—Teji transaction is not a wagering contract unless agreement not to claim performance in case of market rising, is proved—Contract Act, S. 30.*

In the Teji transactions there is no utter indifference of one party where he was going to buy or sell. In the defence to a suit on Teji transaction the defendant has to prove that there was an agreement or understanding between him and the plaintiff that in case the market rose the plaintiff should not require the defendant to deliver to him the goods. Teji transactions are not wagering contracts unless the above agreement or understanding is positively proved.

[P. 70, C. 2.]

Munshi with *M. V. Desai*—for Plaintiff.

Khan with *Mirza*—for Defendant.

Kincaid, J.:—The plaintiff has brought the present suit to recover from the defendants, as the result of certain transactions in Japanese camphor, the sum of Rs. 50,751-4-0 together with interest thereon at nine per cent. from 25th April, 1919, together with costs and further interest on judgment at six per cent. per annum until payment.

The defendants have not denied the alleged transactions but have pleaded that they were wagering contracts and have asked that the suit be dismissed with costs.

The following issues were framed by Mr. Khan, the defendants' counsel:—

1. Were the transactions in the suit wagering transactions?

2. Is the plaintiff entitled to any and, if so, what relief?

The facts of this interesting case are a little complicated and I shall go into them as fully as I can in order to help the reader to understand them.

There are three common forms of speculations in Bombay. They are known respectively as *teji-mandi*, *teji* and *mandi*. The word *teji* means brightnees, the word *mandi* means dulness. Thus *teji* is used to signify a rise in the market price of goods or stock, and *mandi* to signify a fall. In the *teji-mandi* transactions, which have been very carefully examined by Beaman, J. in *Jessiram Jugannath* v. *Tulsidas Damodar*, (1) one party buys what is known as a double option. For this he pays a certain premium, say Rs. 20 per Rs. 1,000. On the settling day the buyer has the right to declare himself either a seller or a buyer. If the market falls he will declare himself a seller. If it rises he will declare himself a buyer, *e.g.*, if it be supposed that by the contract price a bar of silver or a bale of goods is worth Rs. 100, A buys the double option for Rs. 20, if the goods rise to Rs. 100, he will declare himself a buyer and will lose Rs. 10. If the goods fall to Rs. 90 he will declare himself a seller and will lose Rs. 10. But if the goods rise to Rs. 150 or fall to Rs. 50, he will declare himself a buyer and a seller respectively and in each case will make Rs. 30 profit.

In other words, to use Beaman, J.'s phrase, "the party buying the double option (the *teji-mandi*) is backing the fluctuations of the market against its stability." Conversely, the party who sells the double option backs the stability of the market against its fluctuations.

The *teji* transaction is quite a different one. In it the buyer of the *teji* (*lagadanaro* or applier) pays the seller (*khanaro* or either) a premium or *teji* over and above the contract price of the bar of silver or bale of goods. If the market rises the buyer of the *teji* who

(1) (1912) 37 Bom. 264=16 I. C. 576=14 Bom. L. R. 617.

is also a buyer of the silver or the goods can ask the seller of the *teji* to give him the goods or their value at the market rate on settling day whatever it be. If the market falls, the buyer of the *teji* merely loses his premium, *e.g.*, A buys Rs. 100 worth of bar-silver from B and also buys *teji* by the payment of Rs. 20 premium. If the market rises to Rs. 150, A will make a profit of Rs. 50 minus his Rs. 20. If the market falls to Rs. 50, A will lose his Rs. 20 premium or *teji* only. A thus insures himself against a big fall: B is not insured against a big rise.

The third kind of transaction is a *mandi*. It is the exact converse of the *teji*. The buyer of the *mandi* or premium is a seller of the goods and the *mandi* is the premium which he pays against a possible rise, *e. g.*, A sells Rs. 100 worth of bar-silver to B and buys *mandi* by the payment of Rs. 20 premium. If the market falls to Rs. 50, A will make a profit of Rs. 50 minus his premium. If the market rises to Rs. 150, A will lose his Rs. 20 premium or *mandi* only.

The transactions with which we are concerned are *teji* transactions. On the 6th January, 1919, the plaintiff bought from the defendant twenty-five cases of Japanese camphor at the rate of Rs. 2-12 a tin for delivery on the 15th April, 1919. On the 7th January, 1919 the plaintiff paid the defendant Rs. 125 as *teji* at the rate of one anna on every Rs. 2-12-0.

On the 7th February, 1919, the plaintiff bought for the same delivery one hundred cases of Japanese camphor at Rs. 2-13-0 a tin and on the 8th February paid Rs. 500 as *teji* at the rate of one anna on every Rs. 2-13-0. On the 15th February, 1919, the plaintiff bought one hundred and fifty cases of Japanese camphor for the same delivery at Rs. 2-15-0 a tin and on the same day paid the defendant Rs. 750-0-0 as *teji* at the rate of one anna for every Rs. 2-15-0. Now if the price of the camphor had fallen, no matter how little or how much, the plaintiff would have forfeited his *teji*.

Unfortunately for the defendant the price of camphor had risen by settling day to Rs. 5-2-0 per tin. The plaintiff, on the 14th April, 1919, wrote to the defendant an attorney's letter saying that he would take delivery the next day (Exhibit A). On the 15th he went to the defendant's firm, tendered the contract price, and asked for delivery of camphor. The defendant had no camphor to deliver. At the same time he wrote in reply to the plaintiff's letter that the plaintiff was not entitled to any delivery and that the transactions were invalid. After some correspondence the plaintiff filed the present suit for the difference between the rate at which he bought the camphor and its price on the settling day.

Before discussing the arguments advanced by the learned counsel, I wish to record my appreciation of the assistance which they have both given me in this difficult and intricate case.

Mr. Khan for the defendant has relied on the judgments of Beaman, J, in a series of *teji-mandi* suits. The first in order of time was *Hariram* v. *Trikamdas* (O. C. J. Suit No. 100 of 1903 unrep.) Therein the learned Judge has observed:—

"While, therefore, I am now prepared to admit that it is open to any party suing upon a *Teji-Mandi* transaction to satisfy the Court if he can that the particular instance was a genuine transaction in which the parties did intend, at the time of entering into it, that delivery should be given and taken, I still think that the presumption would be very strong against *Teji-Mandi* transactions as a class being genuine and lawful."

In *Jessiram Juggonath* v. *Tulsidas Damodar* (1), Beaman, J., observed in regard to *teji-mandi* business (p. 624):—

"From the very nature of the transaction, from the fact of a man being utterly indifferent whether he is going to buy or sell, there must arise a very strong presumption that he is not doing a genuine business and that the whole contract is really in the nature of a pure wager. I have already pointed out that that presumption may in special cases be rebutted but as a rule, I think, it will be extremely difficult to do so."

Finally, in *Basantlal* v. *Shivnarayan* (2), the learned Judge observed at the outset of his judgment:—

"I take this opportunity of re-affirming emphatically, and now virtually

(2) O. C. J. Suit No. 666 of 1915.

stripped of any qualifications whatever, the opinion that in this market *Teji-Mandi* transactions are all wagers. The more closely I look into the true character and intention of these transactions, even when they are put forward as between shroff and shroff, the more evident it becomes that they are essentially by way of gaming and wagering."

On the strength of these authorities Mr. Khan has strongly pressed on me to hold that the present transaction must be a wagering contract, until plaintiff has proved the contrary. But the learned counsel has not realised the substantial difference between *teji-mandi* and *teji* transactions. With all deference to the eminent Judge who tried the three quoted cases, I am not sure that he did not go too far in his condemnation of *teji-mandi* dealing. But whatever their character, there is no resemblance between them and the dealings in the present suit. The main ground on which Beaman, J., held *teji-mandi* business to be wagering was the "utter indifference of one party whether he was going to buy or sell." That ground is absent in *teji* transactions. Therein the party who "applies" the *teji* is always a buyer.

Mr. Khan has next relied on two English cases, *Universal Stock Exchange* v. *Strachan* (3) and *In re Gieve* (4). In the former case the jury found that the real meaning of the parties was that there should be merely a payment of differences. In the latter, the Judges found that "the conduct of the parties led almost necessarily to the inference that they only intended gambling transactions." These two cases have been the foundation of a number of decisions in the Bombay High Court of which the tenor has been much the same.

In *J. H. Tod* v. *Lakhamidas Purshotamdas* (5) Farran, J. observed (pp. 445, 446):—

"Contracts are not wagering contracts, unless it be the intention of both contracting parties, at the time of entering into the contracts, under no circumstances to call for, or give delivery, from or to each other. There is no law against speculation, as there is against gambling."

In *Sassoon* v. *Tookersey* (6) Sir Lawrence Jenkins, C. J. remarked (p. 621):—

"In cases of this description there is a danger of confounding speculation, or that which is popularly described as gambling, with agreements by way of wager; but the distinction in the legal result is vital. To make an agreement a wager there must be a common intention to bet."

In *Mothuradas* v. *Narbadashankar* (7) Beaman, J. observed (p. 1004):—

"I believe that before a Court can hold a contract, on the face of it genuine, or at any rate not clearly wagering as the contract in *In re Gieve* (4) was, to be a wagering contract, the Court must be satisfied that the intention of the parties was in no circumstances either to give or take delivery."

In *Motilal* v. *Govindram* (8) Batchelor, J. held a transaction to be a wagering contract because he held it to be distinctly proved that in the contracts in suit neither party ever intended to give or receive delivery, but both parties intended to settle by the payment and receipt of differences."

In the earlier case, *Hurmukhra* v. *Narotamdas* (9) Davar, J. laid down the following principle (p. 138):—

"If the Court is satisfied that when the parties entered into the agreements before it, both of them intended neither to take or give delivery, but merely intended to adjust the transactions on the due date or dates by the payment or receipt of differences as the case may be...then the Court should have no hesitation in holding that the transactions were mere agreements by way of wagers and as such void in law.

Finally, in the recent decision of *Manalal* v. *Radhakison* (10) Macleod, C. J. observed (p. 1032):—

"The defendants must prove that there was an understanding between them and plaintiffs (1) that they were not only speculating but gambling, (2) that, if they ordered the plaintiffs to buy cotton, they would never call upon them to

(3) (1896) A. C. 166=44 W. R. 497=65 L. J. Q. B. 428.
(4) (1899) 1 Q. B. 794=68 L. J. Q. B. 509.
(5) (1892) 16 Bom. 441.
(6) (1914) 28 Bom. 616=6 Bom. L. R. 521.
(7) (1909) 11 Bom. L. R. 997=4 I.C. 99.
(8) (1905) 30 Bom. 83.=7 Bom. L.R. 385.
(9) (1907) 9 Bom. L. R. 125.
(10) A. I. R. 1921 Bom. 238=45 Bom. 386.

deliver it, and if they ordered them to sell, they would never themselves deliver it."

From these authorities the principle is clear. The defendant in this case has to prove that there was an agreement or understanding between him and the plaintiff that in case the market rose the plaintiff should not require the defendant to deliver to him any camphor. But such an agreement or understanding requires, in my opinion, strict proof.

A defence that the contract was a wagering one is not one that an honourable man would advance on his own behalf. It is a dishonest man's defence; for if he won the defendant would never object the wagering character of the contract and such a defence should not be lightly allowed. In this connection I would rely on the observations of Beaman, J. in *Jessiram Jugannath* v. *Tulasidas Damodar* (1) (p. 628) :—

"Nor do I think the Court ought lightly to favour gambling defences. My own leaning has always been very strongly against them. I think it is only too clear that if dishonest gamblers know that they can evade their liabilities upon every occasion without much trouble by merely pleading wagering, the worst class of gamblers will gamble more desperately and with a greater sense of impunity than they ever did before. The Courts by countenancing such gamblers in receiving their winnings when they win and refusing to pay them when they lose, confident that they will not be compelled by process of law to pay, may indeed foster the evil which both the Legislature and the Courts would desire to see altogether suppressed."

I have, therefore, to see whether the defendant has adequately proved the existence of a definite understanding between him and the plaintiff that in no circumstances whatever was there to be any delivery. Beyond the defendant's own word he has led no evidence whatever. Both parties, however, tried to prove the existence or non-existence of such an understanding by reference to a previous transaction between the defendant and plaintiff.

In January, 1918, the plaintiff made a purchase of seventy-five cases of camphor from the defendant. The contract rate per tin was Rs.1-15-0 and the plaintiff paid *teji* at the rate of one anna per tin. The price of camphor rose with the result that whereas the contract price of the seventy-five cases of camphor was Rs. 11,595, it amounted on settling day to Rs.13,840-5-0. According to the plaintiff he took delivery of the camphor.

Unfortunately his account shows a debit entry of Rs. 13,840-5-0 (Exhibit L) against the defendant and a subsequent entry of Rs. 2,244-6 0 (Exhibit M.) to the defendant's credit. The plaintiff has explained that on the settling day he was in a great hurry and feared that unless he paid for the camphor before closing time the defendant would repudiate his contract. He did not know exactly what he owed him he only knew the approximate amount.

He therefore, gave him a number of *chitis* or drafts on other firms. Afterwards he found that he had overpaid the defendant by Rs. 2,244-6-0 and the latter repaid him this sum later. Now it is most unlikely that a business man would overpay for camphor bought by him by Rs. 2,244-6-0. It is, moreover, absurd for the plaintiff to say that he only knew the approximate price of the camphor. That had been paid in January and the settling day was in April.

The defendant's story is more credible. The defendant and Gopalji Gangji have deposed that as regards fifty cases Vithaldas Asharam sold them to Gopalji Gangji, Gopalji Ganji sold them to defendant, defendant sold them to plaintiff who resold them to Vithaldas Asharam. As the price of camphor had risen considerably on the settling day the parties, instead of delivering camphor from one to the other, simply paid each other the differences Vithaldas Asharam and the plaintiff settled with each other and defendant and Gopalji Gangji settled with each other. The last two settled at Rs. 2-6-0 a case.

But, instead of defendant paying Gopalji Gangji and the latter paying the plaintiff, the defendant paid the plaintiff direct the difference between Rs. 1-15-0 and Rs. 2 6-0 a case, *i.e.*, Re. 0-7-0 a tin. Each case has admittedly eighty tins. 50 multiplied by 80 is equal to 4,000. 4,000 multiplied by 7 is equal to 28,000. 28,000 annas are equal to Rs. 1,750.

If from this, rebate at one-fourth per cent. (Rs. 4-6-0) be deducted the difference on fifty cases was Rs. 1,745-10-0. As regards the remaining twenty-five cases the defendant sold them to the plaintiff who sold them to one Ramanlal and settled with him. The defendant settled with Ramanlal at Rs. 2-?-0. He, therefore, paid the plaintiff the difference between Rs. 2-3-0 and 1-15-0 equal to four annas. Now 25 multiplied by 80 is equal to 2,000. 2,000 multiplied by 4 is equal to 8,000 annas equal to Rs. 500. If rebate be deducted the amount due was Rs. 498-12-0. If to Rs. 498-12-0, Rs. 1,745-10-0 be added the total comes to Rs. 2,244-6-0 the amount paid by the defendant to the plaintiff in Exhibit M.

Therefore I am forced to the conclusion that the plaintiff's story of dealing in this transaction is false and that the parties merely settled differences. The learned counsel for the defendant has also laid great stress on the omission of the word *teji* from the contract and the plaint. But the plaintiff has explained that he worded the contract and the plaint in the way he did because he was afraid that if he inserted the word *teji* in the contract or the plaint the Courts could at once jump to the conclusion that the contract was a wagering one : and in view of the decisions of Beaman, J. in the *teji mandi* cases this was not a wholly unreasonable point of view.

And, although I agree with Mr. Khan that in the January transaction the parties settled differences, I am not thereby forced to conclude that in the transaction before me the parties bound themselves not to make or take delivery. Before I could come to that conclusion I should have to feel certain that in no *teji* transaction is delivery ever given. But Dayal Lalji's Munim, Nagindas Manickchand has deposed that his firm often gives delivery in *teji* transactions and similar evidence was given by Ali Mahomed Abdulla, a partner in the firm of Abdulla Maoji. In one of the cases mentioned by them the plaintiff had a *teji* contract with the firm of Dayal Lalji. They delivered to him one hundred and twenty-five cases and he delivered them again on a *vaida* contract to Ali Mahomed Abdulla. Nor is there anything strange in this. Behind all *vaida* and *teji* contracts there is a vast genuine business. Camphor or other goods may be sold and re-sold a thousand times before they pass from A, the importer, to Z, the distributor.

But in the end they reach their destination. There is no speculation in articles that are not imported into India. It has thus been rightly held that speculation in forward contracts is not necessarily wagering. Now what is the difference between ordinary *vaida* speculation and *teji* contract ? Only this, that the *teji* contract is the less speculative of the two. For he who applies *teji* insures himself by the payment of a *teji* or premium from a heavy fall in the price.

I am thus of opinion that *teji* and *vaida* transactions are on exactly the same footing and that unless it can be positively proved that the parties agreed neither to ask for nor to give delivery the transactions are not wagering contracts. No such agreement has been proved here.

Since no such agreement has been proved and the transactions are not wagering contracts it remains for me to fix the rate of damages. The plaintiff has stated in his evidence that the rate of the camphor on settling day was Rs. 5-2-0. The parties agree to fix the rate at Rs. 5-1-0.

The parties have also agreed that the *teji* was wrongly debited by the plaintiff to the defendant in the particulars. The plaintiff paid the *teji* by way of insurance and cannot ask for it back.

I award the plaintiff a decree for Rs. 48,000 with costs and interest on judgment accordingly.

Claim decreed.

A. I. R. 1922 Bombay 70.

PRATT, J.

Nippon Menkwa Kaimshiki—Plaintiff

v.

F. Portlock—Defendant.

O. C. J. Suit No. 523 of 1921, decided on 5th July, 1921.

Bombay Rent Act (2 of 1908), S. 9 (2)—Ejectment of a tenant by the landlord—Occupation of servant is not that of landlord where it is in part for remuneration—But such occupation is a sufficient cause for ejecting tenant

Where the staff of employees of the landlord company occupy premises under circumstances which show that their accommodation is part of their remuneration, the occupation by the staff is not the occupation of the landlord under Section 9(2) of the Rent Act. But the accommodation of the staff is a satisfactory cause, within the meaning of the above section for the ejectment of a tenant who is not one of the staff,

[P. 73, Cs. 1, 2.]

Campbell with *Coltman*—for Plaintiff.

F. S. Taleyarkhan—for Defendant.

Pratt, J.:—The plaintiffs in this case, the Japanese Cotton Trading Company, purchased, on the 29th July, 1920, the remainder of a sub-lease of Gool Mansion, Mayo Road. The building comprises eight flats, of which one is in the occupation of the defendants as tenants. The plaintiffs purchased the building in order to provide residence for their Japanese staff, and the day after the purchase gave the defendants notice to quit on the 1st of October, 1920. The defendants attorned to the plaintiffs and paid rent which was accepted up to the 1st of October, but as they pleaded the Bombay Rent Act and declined to quit, the plaintiffs have filed this suit.

The following issues were raised:—

(1) whether the purchase of the property in suit by the plaintiffs is not *ultra vires* of the Company, and if so, whether the plaintiffs are entitled to maintain this suit?

(2) whether the plaintiffs require the premises in suit reasonably and *bona fide* for their own use and occupation within the meaning of Section 9 (2) of the Rent Act?

(3) whether there is satisfactory cause within the meaning of Section 9 (2) of the Rent Act?

I disallowed the first issue, as the defendants having attorned the plaintiffs are estopped from denying the title of their landlord. Further, it can make no difference to them, whether the suit is brought by the Company itself or by the purchasing directors.

As to the reasonableness and *bona fide* of the plaintiffs' requirements, there can be no doubt. The Japanese staff consists of six married couples, ten children and twenty-nine bachelors. Of these, five bachelors are on leave and twelve bachelors, one wife and five children are to arrive in a few months. The remainder of five married couples, five children and thirteen bachelors, are housed in a bungalow at Malabar Hill, a flat at Rafaya Manzil, and two temporarily in a boarding house. The occupants of Rafaya Manzil are under notice to quit.

The Company, therefore, propose now to divide their staff between the Malabar Hill bungalow and Gool Mansion. The Managing Director for Bombay with his wife and five children and eight bachelors in the former, and the rest of the staff in the latter. This allotment is fully set out in Exhibit A, and the accommodation thus provided errs, if at all, on the side of economy of space.

It is faintly suggested that the allotment of one room in the flats to an "office" is a contravention of the head lease from the improvement trust forbidding the use of any part of the premises without the consent of the trust "for any business, trade or occupation or any purpose whatsoever other than a dwelling house." But the so-called office is merely a room where the Code book is kept, where telegrams are received after office hours and de-coded, and where transaction thus made are recorded. No outsiders visit this room for business, and it is therefore no different to the room in a dwelling house in which a barrister reads his briefs at night. This use of the room is not inconsistent with its occupation as a dwelling house, and in any case the only person who can raise the objection is the lessor or the sub-lessor.

The second issue raises the question whether the occupation of the servants of the Company is in law the occupation of the landlord. Under Section 9 (2) of the Bombay Rent Act the landlord must show that the premises are required reasonably and *bona fide* "for his own occupation." Is the occupation of the Company's staff equivalent in law to the landlord's own occupation?

Now, the section only recognises two grounds founded on the occupation of the premises: (1) for the landlord's *own* occupation, and (2) for the occupation of any person for whose benefit the premises are held. The effect of the word "*own*" is no doubt to emphasize

the personality of the subject, as for instance, the phrase "every man is his own lawyer." Here it emphasizes the personality of the landlord. But I think this emphasis is used merely to contrast the occupation of the landlord with the occupation of the *cestui que* trust or beneficial owner. It is not intended to exclude the rule of law that the occupation of a servant is the occupation of the master. *Optimus interpres rerum usus* and the section has always been so construed. In deciding on the requirements of landlords, it has always been the practice to consider the space required for the accommodation of servants.

Mr. Taleyarkhan relies upon the words "some other person in his employ" in the corresponding section of the English Act, and argues that their omission in the Indian Act shows that the Indian Legislature declined to recognise the occupation of a servant. But the occupation of a servant may be either *qua* servant that of his master or *qua* tenant of his master. The English section refers to the latter and does not touch the former. It allows the landlord to substitute another tenant if that tenant be in his employ; but it in no way affects the rule that the occupation of the servant *qua* servant is the occupation of the master.

The question then is whether the staff were occupying premises as servants of the landlord Company or as their tenants. The test is whether this occupation is necessary to or ancillary to the performance of the servants' duties. In the case of *Dobson* v. *Jones*, (1) a surgeon, who resided in a hospital so that he might be able more readily to perform the services required of him, was held to occupy as a servant. Tindal, C.J. in that case said (p. 120):—

"The coachman who is placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at a park gate, cannot be considered to occupy as tenants, but as servants merely whose possession and occupation is strictly and properly that of their masters."

So, also, in the case of *Bent* v. *Roberts* (2), a constable occupying quarters in the Police Station building was held to occupy as a servant.

But where the occupation is by way of remuneration or part-payment for services, the servant occupies not as a servant but as a tenant. In *Martin* v. *Assessment Committee of West Derby* (3), a Police Superintendent was held to be a tenant of quarters which were at some distance from the Police Station.

TheCompany's staff will pay no rent for the premises they occupy, but that will make no difference if their occupation is part of their remuneration and not necessary and subservient to the performance of their services. This is illustrated by the case of *Queen* v. *Spurrell* (4), where Cockburn, C. J. said:—

"It may be that it happens to be convenient both to the master and to the servant, that the servant requiring some place of habitation shall, by agreement with the master instead of receiving so much for his wages, out of which wages he would have to find himself a separate habitation, inhabit some premises of the master as part of the remuneration for his services; but it is only an equivalent for wages. He would be receiving in the one instance the whole amount of his wages, out of those wages he would have to find himself a habitation, for which he would have to pay rent; in the other he inhabits premises of his master, and instead of paying the master the rent the master deducts it from the wages."

Now the Company's place of business is not at Mayo Road, and the residence of the staff in this building is not necessary to the performance of their services.

Any other residence in Bombay would do equally well. In fact, some of the staff are residing at Malabar Hill. Further, it is clear that their occupation is by way of remuneration. The Company's Director produces the rules of the Company regulating its dealings with the employees. It is a compilation as comprehensive and far more lucid than the Civil Service Regulations. Rule 118 is as follows:—

"Persons, who are serving in the branches or agencies abroad, are to be provided with house accommodation and are also payable foreign service allowance within the limit of the following table."

(1) (1844) 8 Scott (N. R.) 80=5 Man. & G. 113=134 E.R. 502=13 L.J. C. P. 126.
(2) (1878) 47 L.J. Ex 112=26 W. R. 128=3 Ex. D. 66=37 L.T. 673.
(3) (1883) 52 L J. Mc. 66=11 Q. B. D. 145=47 J.P. 500.
(4) (1865) 14 W.R. 81=1 Q.B. 72=35 L.J. Mc. 74=12 L.T. 364.

The Japanese staff, when serving out of Japan, are entitled to foreign service allowance and house accommodation as part of their remuneration. Therefore, although they pay no rent, their occupation will be not as servants but as tenants.

I must, therefore, decide the second issue in the negative as the occupation of the staff will not be the occupation of the landlord company.

But there is another ground on which the plaintiffs rely, and that is the general ground of any cause which may be deemed by the Court to be sufficient. This point arose last year in the case of the *Honkong Shanghai Banking Corporation Ltd.* v. *Boyagis* (5) decided by my brother Marten, J. The case went off on other grounds, but Marten, J., though not called upon to decide it, referred to the recent English cases of *Stovin* v. *Fairbrass* (6) and *Stephens* v. *Tatham* (7). *Stephens* v. *Tatham* (7) merely follows the decision of the Court of Appeal in *Stovin* v. *Fairbrass* (6), and the latter is the only case that requires consideration. It was based upon the corresponding section of the English Act Section I (3) of the Increase of Rent and Mortgage Interest (War Restrictions Act), 1915 (5 & 6 Geo. V. c. 97). In that section, there are three instances of grounds founded on the landlord's requirements in reference to occupation followed by the general words "some other ground which may be deemed satisfactory to the Court." This part of the section is as follows:—

"Or that the premises are reasonably required by the landlord for the occupation of himself or some other person in his employ, or in the employ of some tenant from him, or on some other ground which may be deemed satisfactory by the Court making such order."

The three instances founded on the landlord's requirements as to accommodation are (1) occupation by the landlord himself, (2) occupation by the employee, and (3) occupation by the tenants' employee and then follow the general words as to satisfactory cause.

In *Stovin* v. *Fairbrass* (6), the landlord required the premises in order to give vacant possession to his vendee. This was not one of the three specified cases and the Court held that it would not come under the general cause, because the exercise by the Court of its discretion in favour of the occupation of a person not so specified would be inconsistent with the particular specification of three cases of occupation. The Court held in effect that the general words "some other cause" are restricted to cases not *sui generis* with the three causes specified. Scrutton, L. J., differed on this point, and indeed the word "other" is usually construed to be either unrestricted in its generality or limited to cases *sui generis* with the particular words that precede it.

But it is not necessary to consider whether *Stovin* v. *Fairbrass* (6) was correctly decided, for the scheme of the section of the India Act is different. For the words "some other ground which may be deemed satisfactory by the Court" the words "any cause which may be deemed satisfactory by the Court" are substituted. The word "any" is as wide as possible; *Beckett* v. *Sutton* (8). The word "any" excludes limitation or qualification *Duck* v. *Bates* (9). They place no limit on the discretion of the Court, and it seems to me therefore, that the *ratio decidendi* of *Stovin* v. *Fairbrass* (6) is not applicable to the Indian section. Under the Indian Act the discretion of the Court in determining what is a satisfactory cause is unfettered.

Then I have to ask myself the question whether the cause shown by the plaintiff Company regarding the accommodation of their staff is satisfactory. Under the English Act this is a specified ground. Does its omission in the Indian Act lead to an inference that it is not so in India? I think not. The particular cases of accommodation of an employee of a landlord or the employee of a tenant are omitted in the Indian Act, merely because they are superfluous in view of the very wide terms of the last clause. I think the accommodation of a staff of employees is sufficient cause under Section 9 (2) of the Bombay Rent Act. I am fortified in this opinion by the fact that express provision is made for such a case in the English Act.

The plaintiffs have spent four lacks in the purchase of the leasehold of the pro-

(5) (1920) Suits, 582 and 583 of 1920.
(6) (1919) 88 L. J. K. B. 1004=121 L. T. 172 =83 J. P. 241=35 T. L. R 659.
(7) 1919 W. N. 334.
(8) (1882) 30 W. R. 490=51 L. J. Ch. 432= 19 Ch. D. 646.
(9) (1883) 53 L. J. Q. B. 338=12 Q.B.D. 79=50 L.T. 778=48 J.P. 501.

perty in order to accommodate their staff, and it would be grossest injustice to prevent them from putting it to the use for which they purchased it. This would tantamount to expropriation, and the object of the Bombay Rent Act is not the expropriation of the landlord but the prevention of profiteering.

Decree, therefore, that the defendants do deliver vacant possession to the plaintiffs on or before the 19th of July, 1921 or in case an appeal is filed before that day on or before the 14th of September, 1921. Defendants to pay plaintiffs compensation at the rate of Rs. 275 per mensem from 1st October, 1920, to the date of delivery of possession and to pay plaintiffs' costs of this suit.

Suit decreed.

A. I. R. 1922 Bombay 74.

MACLEOD, C. J. AND COYAJEE, J.

Wali Mahomed Himad—Plaintiff-Applicant

v.

G. I. P. Railway—Defendant-Opposite Party.

Civil E. A. No. 183 of 1921, decided on 11th January, 1922, against the decision of the 1st Class Sub.-Judge, Jalgaon, in Small Cause Suit No. 1137 of 1920.

Railway Company—Risk-note—Form B—Carrying of consignment by a longer route against the contract—Loss—Company cannot rely on risk-note.

The contract with the Company was to carry the goods by the nearest route, and that, if the Railway Company, to suit their convenience, wished to carry the goods by a longer route which offered far more opportunity for the loss to occur, they were bound to give notice to the consignor so as to give him an opportunity of deciding whether he should sign the risk-note in Form B or not. The evidence also showed that the route *via* Dhond and Manmad would be the usual route for goods coming from Southern India *via* Raichur, and that as a matter of fact, the charges were recovered from the plaintiff as if the goods had travelled *via* Dhond and Manmad.

Held, that the Company carrying the goods *via* Kalyan went outside the terms of the contract and could no longer rely on the protection afforded by the risk-note as to be absolved from liability for the loss which occurred.

[P. 74, C. 2; P. 75, C. 1]

I. J. Sopher for *M. B. Ashtaputre*—for Applicant.

T. Strangman—for Opposite-party.

Macleod, C. J.:—This was a suit filed by the consignee of certain goods which were delivered to the South Indian Railway Company, to be carried from Sevoy Petoy, a station on the South Indian Railway to Jalgaon, a station on the defendant Railway Company. Admittedly when the goods arrived at Jalgaon, the oil of fourteen tins had been removed and lost to the consignee. The consignor had signed a risk-note in the Form B, and so the G. I. P. Railway Company would not be liable for any such loss, unless it could be shown to have occurred owing to the wilful neglect of their servants, provided the goods were carried in accordance with the contract of carriage.

It was proved that the waggon containing the plaintiff's goods instead of travelling along the shortest route *via* Dhond and Manmad was carried to Kalyan, and thence to Jalgaon. There was evidence that the Station Master of Kalyan had to put fresh seals on the waggon containing the plaintiff's goods and that would point to the loss having occurred between Kalyan and Dhond. The learned Judge found that there was no evidence to show that the Company agreed to carry the consignment *via* Dhond and Manmad, and that the only agreement was to carry the goods *via* Raichur. He also was of opinion that the carriage *via* Kalyan was more attractive to the plaintiff because there was only one junction on the route *via* Kalyan while by the other route there were two, *viz.*, Dhond and Manmad. He forgot the fact that the goods-train had to be marshalled at Lanowla and re-marshalled at Karjat before it arrived at Kalyan, and that the same process would have to be repeated at Kasara and Igatpuri on the way from Kalyan to Jalgaon, and, therefore, instead of that route being more attractive to the plaintiff, there would be many more opportunities for the loss to occur than on the route *via* Dhond and Manmad.

It seems obvious that the contract was to carry the goods by the nearest route, and that if the Railway Company, to suit their convenience, wished to carry the goods by a longer route which offered far more opportunity for the loss to occur, they were bound to give notice to the consignor so as to give him an opportunity of deciding whether he

should sign the risk-note in Form B or not. The evidence also shows that the route *via* Dhond and Manmad would be the usual route for goods coming from Southern India *via* Raichur, and that as a matter of fact, the charges were recovered from the plaintiff as if the goods had travelled *via* Dhond and Manmad. It seems to us, therefore, that the Company by carrying the goods *via* Kalyan went outside the terms of the contract and could no longer rely on the protection afforded by the risk-note so as to be absolved from liability for the loss which occurred.

Therefore the decree dismissing the suit must be set aside and there must be a decree for the plaintiff with costs throughout.

Rule made absolute.

A. I. R. 1922 Bombay 75.

MACLEOD, C.J. AND SHAH, J.

In re The Tata Industrial Bank, Ltd.

Civil Reference No. 12 of 1921, decided on 10th October, 1921. Reference made by the Chief Revenue Authority, under Section 51 of Indian Income Tax Act, 1918.

Income Tax Act, S. 9—'Profits' means chargeable income—No deduction, not detailed in S. 9 (2) can be allowed.

'Profits' in Section 9 of the Act means chargeable income and must be computed from the gross income after allowing for the sums paid and debited as detailed in sub-Section (2).

The assessing officer is not entitled to allow any deduction for sums paid or debited other than those properly paid and debited as detailed in sub-Section (2) [P. 77, C. 2.]

B. J. Desai—for Tata Industrial Bank.

Bahadurji I. C.Bowen—for the Crown.

Macleod, C. J. :—This is a reference by the Chief Revenue Authority, Bombay, under Section 51 of the Indian Income Tax Act, with regard to the interpretation of Section 9 of the Act.

The Tata Industrial Bank was assessed by the Collector of Income Tax for the year 1920-21 on profits amounting to nearly thirteen lacs. I omit all mention of super-tax as unnecessary. On appeal to the Commissioner a slight reduction was made, but before both authorities an important question was raised by the Bank since they claimed to deduct from the taxable profits a sum of Rs. 2,98,000 said to be the amount of depreciation on war bonds and securities belonging to the Bank, arrived at by comparing the market rates with the valuations in the Books of the Bank. This deduction was not allowed on the ground that the only allowances and deductions to be made from the gross income in order to arrive at real assessable profits were those mentioned in sub-Section 2 of Section 9.

The following questions were referred to the High Court for decision:—

(1) Whether on a true construction of the Indian Income Tax Act of 1918 and in particular Section 9, the only allowances and deductions to be made from the gross income, in order to arrive at real assessable profits, are those mentioned in sub-Section 2 of Section 9 and whether the said Section 9 prohibits any allowances or deductions other than those specifically mentioned therein.

(2) Whether on a true construction of the said Act and in particular Section 9, the assessing officer is not entitled in his discretion to allow a deduction which is proper and necessary to be made in addition to those specifically enumerated in sub-Section 2 in order to ascertain the real assessable profits.

(3) Whether the deduction of Rs. 29,800 (being the amount of depreciation on war bonds and securities) out of the gross earnings of the assessee is a deduction proper and necessary to be made in order to ascertain the real assessable profits under the said Act, and

(4) Whether the Act attaches to the expression 'profits' a meaning different from what is known as commercial profits.

Section 5 of the Act includes among the classes of income which shall be chargeable to income tax 'Income derived from business."

Under Section 9 (1) the tax shall be payable by an assessee under the head 'Income derived from business' in respect of the profits of any business carried on by him.

Under Section 9 (2) such profits shall be computed after making the following allowances in respect of sums paid or in the case of depreciation debited.

Items I to V, VIII and IX are items of actual expenditure, item VII deals with the case of machinery sold at a less price than the cost less depreciation, item VI deals with the depreciation of machinery, plant and building.

It would appear, therefore, that with

regard to assets owned by the assessee other than machinery, plant and buildings, a debit for depreciation is not allowed.

The difficulty in the case arises from the fact that various meanings can be ascribed to the word 'profits.'

The petitioners have relied on the definition of 'profits' as laid down in *In re Spanish Prospecting Company Limited* (1). The claimants agreed to serve the Company at a fixed salary which they were not to be entitled to draw except out of profits (if any) arising from the business of the Company. The Company went into voluntary liquidation. After all the creditors except the claimants were paid and all the capital subscribed was paid to the shareholders, there remained a surplus in the hands of the liquidators which the claimants contended should be treated as profits within the terms of their agreement. Two contributories took out a summons asking for a declaration that the claimants were not entitled to prove in respect of the surplus on the ground that profits should be restricted to profits realized by the Company on a growing concern.

Fletcher, Moulton, L.J., said (p. 98):—

"The word 'profits' has in my opinion a well defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. 'Profits' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates. For practical purposes these assets in calculating profits must be valued and not merely enumerated. A depreciation in value, whether from physical or commercial causes, which affects their realizable value is in truth a business loss. But though there is a wide field for variation of practice in these estimations of profits in the domestic documents of a firm or a company, this liberty ceases at once when the rights of third parties intervene. For instance, the revenue has a right to a certain percentage of the profits of a Company by way of income-tax. The actual profit and loss accounts of the Company do not in any way bind the Crown in arriving at the tax to be paid."

(1) [1911] 1 Ch. 92=18 Manson 191=80 L. J. Ch. 210.

No doubt in the balance sheet of a business the excess of assets over liabilities or *vice versa* is represented by a credit or debit to the profit and loss account, so as to make the totals even. There is not much difficulty in calculating the liabilities, the value of the balance sheet depends on the correct valuation of the assets. It is the reckless or over sanguine valuation of assets which is the precursor of ruin. Now if it had been intended by the Act that the profits for any particular year should be calculated by the gain in the excess of assets over liabilities during that period nothing would have been easier than to give expression to that intention.

But, on the one hand, difficulties would arise in the case of every assessment in ascertaining that the assessee had made a fair valuation of his assets while, on the other, the assessee would be taxed on every appreciation in the market value of his assets, and that is certainly not the object of an Income Tax Act. It must be remembered that the word 'profit' is only used for explaining the method by which taxable income is to be computed. I am, therefore, clearly of opinion that we are not concerned with the legal definition of 'profits' as laid down by Fletcher Moulton, L. J., in the case above cited.

As the learned Lord Justice points out, a firm or a Company has a wide field for variation in practice in its estimation of its profits but that liberty ceases when the rights of a third party intervene. And in the case of income tax the Legislature prescribes the manner in which the taxable amount is to be calculated.

The income of a business may be defined as the gross earnings either actually received or properly considered as if they had been received, after deducting all ordinary expenses incurred in the earning. These expenses must come under one of the items I to V, VIII and IX of Section 9 (2). When the questions arise how the income is

to be disposed of, the distinction between income and profits as legally defined above will be clearly seen, and profits may be fairly accurately described as that amount which can be taken out of the business for dividends or private expenses without impairing its efficiency. Of course out of that amount something may still be left in the business by way of reserve but it is not disputed that any sum credited to reserve is liable to be taxed. It may also be as well to note that we are not concerned with the case of a business which deals in stocks and shares, looking solely for its income to the gains made by buying and selling, for it seems to be admitted that then anticipated losses may be deducted.

We have been referred to the corresponding provisions of the English Income Tax Act but it would appear that the Indian Legislature has deliberately refrained from adopting those provisions, and instead of detailing allowances which cannot be deducted mentions specifically those which can be. At the same time no English case has been cited to us in which a deduction for depreciation such as is now claimed has been allowed. In the rules applicable to cases I and II of Schedule D of the Income Tax Act, 8 and 9 Geo. V., c. 5, the only rule which deals with depreciation is Rule 6 in which a deduction for depreciation of machinery and plant can be allowed from the profits or gain of a trade.

Apart from that the only deductions which would be allowed if not prohibited would be expenses incurred solely for the purpose of earning the profits, and any other debits for depreciation would not come within this category. It seems to me, therefore, that in construing sections 5 and 9 of the Act, chargeable income is synonymous with profits and Section 9 (2) prescribes how those profits are to be ascertained. From the gross income only certain debits for depreciation are to be allowed and this debit asked for by the bank not being mentioned therein cannot be allowed.

I think this was the obvious intention of the Legislature, since, while depreciation of machinery, plant and buildings can easily be calculated as provided in the Act, it would be a very different matter to have to enter into such calculations with regard to assets other than these. But this much is clear that if the profits of a business are to be calculated according to the legal definition of profits, that method of calculation must be continued from year to year, and an assessee would not be allowed to write down his assets in a year when market values had declined without writing them up when values had increased.

I would answer the questions propounded in the reference as follows:—

1. Profits in Section 9 of the Act mean chargeable income and must be computed from the gross income after allowing for the sums paid and debited as detailed in sub-Section (2).

2. The assessing officer is not entitled to allow any deduction for sums paid or debited other than those properly paid and debited as detailed in sub-Section (2).

3. No.

4. 'Profits' in the Act means chargeable income.

The Bank will have to pay the costs of the reference.

Shah, J. :—On this reference the position appears to me to be simple and clear though on account of the way in which the questions have been formulated it has become unnecessarily difficult. On the interpretation of Section 9, it seems to me to be clear that the tax under the head "Income derived from business" is payable in respect of the profits of the business carried on by the assessee. The meaning of the word 'profits' is not defined: but I agree with the learned Chief Justice on this point in holding that it is the gross income of the business.

Even then it may be open to the assessing authority to take into consideration the nature of the business and the losses, if any, in determining the profits or the gross income of the business. The section does not make any provision as to how the profits are to be determined. But it seems to me that where a deduction is proper and necessary to be made in order to ascertain the 'profits' or gross income of any business, the assessing authority may allow it in his discretion.

The section, however, makes provision for making allowances in respect of certain sums paid or in the case of depreciation debited by the Company or the individual concerned. They are stated in Section 9, sub-Section (2) and it is clear

that those are the only allowances which the party could claim as of right. The Collector is not bound to make any other allowances in favour of the party, nor is the party entitled thereto as of right.

In the present case the depreciation claimed by the Company is not covered by any clause of Section 9 (2) and cannot be allowed as such. This position is not seriously contested before us on behalf of the Company. But it is urged that as an item of loss it is open to the Collector to allow it in calculating the profits or the gross income of the business during the year in question. As stated in the letter of reference, the attitude taken up by the Company before the Revenue Authorities was to claim only depreciation as such without agreeing to take into account appreciation, if any.

As regards this point the position for the Crown has been very fairly and in my opinion correctly stated by the Chief Revenue Authority in paragraph 12 of the reference. This reference must, therefore, be dealt with on the footing that the deduction claimed by the Company is in respect of depreciation as such and not as an item of loss or gain in the business during the year. This will prejudice neither the right of the Company to claim, nor the power of the Revenue Authorities to make, due allowance for any loss or gain in virtue of depreciation or appreciation of the various securities in the course of and as part of the business in determining the amount of the profits or gross income of that business, if the facts essential for making such allowance are established.

It is not easy, in my opinion, to formulate categorical replies to the questions some of which are general. Treating the reference, however, as limited to the claim made before the Revenue Authorities for depreciation as such, I concur in the answers proposed by my Lord, the Chief Justice to the questions raised in this reference as also in the order as to costs.

On the 4th November, 1921, the Bank's attorney moved for an order fixing up the scale of costs.

Macleod, C. J.:—Following our decision in *In re Aurangabad Mills Ltd.* (2) the costs will be taxed as on the Original Side. But in order to avoid any question being raised in future whether the Court has jurisdiction in references of this nature to direct costs to be taxed on the Original Side scale, it will be advisable to consider whether a rule should be framed under the Bombay Pleaders' Act, XVII of 1920.

References answered.

(2) A.I.R. 1921 B. 159=45 Bom. 1286.

A. I. R. 1922 Bombay 78.

MACLEOD, C. J. AND SHAH, J.

Rabiabibi—Plaintiff-Appellant

v.

Gangadhar Vishnu Puranik and another—Defendants-Respondents.

F. A. No. 277 of 1920, decided on 9th November, 1921, from the decision of the 1st Class Sub-Judge, Thana, in Civil Suit No. 165 of 1917.

Bombay Salt Act, Ss. 11 and 47—Lease—Condition, not to sub-lease without written permission—Sub-lease without permission is void—Contract Act, S. 23.

The lessee, from the Government, of Salt pans on condition not to sub-let them without written permission cannot do so without such permission, and the sub-lease against the condition of the license is unenforceable at law. *Ismalji Yusufali* v. *Raghunath Lachiram* 33 Bom 636 followed.

[P. 78, C. 1.]

Coyajee with *W. B. Pradhan*—for Appellant.

P. B. Shingne—for Respondents.

Macleod, C. J.:—This case is covered by the decision in *Ismalji Yusufalli* v. *Raghunath Lachiram* (1) in which the facts were similar to the facts in this case. The licensee, Yusufally, who held his lease to certain salt pans on condition that he should not sub-let without the written permission of the Collector, sub-let them to the respondents without getting such permission. Then Yusufally, having died, his son obtained a fresh license from Government. The respondent obtained a fresh sub-lease on the same terms as those contained in the sub-lease obtained from Yusufally but no permission had been obtained from the Collector.

It was urged in second appeal that the appellant manufactured salt not only under the sub-lease but also under the power-of-attorney by the appellant. The Court held that there was no evidence in support of that.

Chandavarkar Acting, C. J., said at page 643:—

"The real object and necessary effect

(1) (1909) 33 B. 636=11 Bom. L. R. 748.

of the agreement between the appellant and the respondent was to enable the latter to manufacture salt without a licence in the guise of a sub-lease, although that was forbidden by law and by the terms of the license."

Mr. Justice Heaton said :—

"The question, therefore is whether the object of the agreement is forbidden by law within the meaning of Section 23 of the Contract Act. It seems to me that it is, for the object was to enable the plaintiff to manufacture salt without a license, and the law says that no salt shall be manufactured otherwise than by the authority of a license granted by the Collector."

In this case it had also been urged in the trial Court that the appellants were really servants of the licensee and agreed as such servants to work the salt pans. But considering the terms of the agreement, it is perfectly obvious, although the term "service bond" is used in the sub-lease, that the appellants in consideration of a certain sum paid agreed to work the salt pans for the manufacture of salt for a particular period and to do all that was required for the purposes of manufacture. There is nothing, therefore, in the nature of an agreement between master and servant which might save the appellants from having their suit dismissed.

I think, therefore, that we are bound by the decision in *Ismalji* v. *Raghunath* and that the appeal must be dismissed with costs.

Shah, J. :—I agree. I desire to add that apart from the decision in *Ismalji Yusafalli* v. *Raghunath Lachiram* (1) I should have found it difficult to hold that a breach of the condition of the license as to the sub-letting in so far as the permission of the Collector in writing was not obtained would necessarily mean that the object of the provisions of the Salt Act was defeated thereby.

However, there is a clear decision of this Court on the point and it is binding on us. On this ground the appeal must be dismissed with costs. *Appeal dismissed.*

(1) (1909) 33 Bom. 636=3 I. C. 779=11 Bom. L. R. 748.

A. I. R. 1922 Bombay 79.

MACLEOD, C. J. AND SHAH, J.

Yosef David Varulker and others—Appellants

v.

Moses Solomon Talker—Plaintiff-Respondent.

Second Appeal No. 182 of 1921, decided on 23rd December, 1921, from the decision of the District Judge, Thana in A. 72 of 1920.

Easement Act, S. 15—Right of passage for plaintiff's privy—Sweeper can be acquired by 20 years user.

The right of easement in respect of a sweeper's passage for cleaning a privy through the land of another is acquired if the passage is used for 20 years as of right without interruption.

[P. 79, C. 2.]

Coyajee with *P. B. Shingne*—for Appellants.

G. S. Mulgaonkar and *W. P. Pradhan*—for Respondent.

Macleod, C. J. :—Both the lower Courts have held on the evidence that the plaintiff's sweeper used the passage along the east side of the hedge inside the defendants' compound to get to the privy, which curiously enough was built so that the sweeper could only have access to it from the defendants' compound. That is a question of fact which it is difficult to avoid, and I see no reason myself for disturbing the decision of the lower Courts. The defendants evidently have been very remiss, because from the photograph which has been produced here the privy must certainly be a nuisance to them as it is within a few feet of their house. But at the same time any casual observer must have noticed that it was cleaned from the defendants' side of the hedge.

Therefore, they must have had knowledge that the plaintiff's sweeper was using the lane. As the Judge was satisfied that the lane was used by the plaintiff's sweeper as of right for more than twenty years, a right to an easement has been established. I would advise the defendants to move the Municipality to require the plaintiff to remove the privy further away from the plaintiff's house. In that case the privy will not have to be cleaned by the sweeper using the defendants' ground. The appeal must be dismissed with costs.

Shah, J. :—I concur. I cannot say that I am quite satisfied with the finding in this case by the lower appellate Court, but it is a finding of fact, and I do not think it is reasonably possible to interfere with the finding in second appeal, though, having regard to the situation of the house, I should have been very glad to see my way to relieve the defendants from the obligation of providing a passage for the plaintiff's sweeper over their ground. *Appeal dismissed.*

A. I. R. 1922 Bombay 80.

MACLEOD, C. J. AND SHAH, J.

Laxmi Bank Ltd.—Creditor-Appellant

v.

Ramchandra Narayan Apte—Respondent.

Second Appeal No. 706 of 1921, decided on 21st December, 1921 from a decision of Joint Judge, Poona in Mis. A. No. 1 of 1921.

Provincial Insolvency Act, 3 of 1907, Ss. 15, 14 (1) 11, 6 3)—Petition by a debtor—Enquiry as to the true and full disclosure of the property is not relevant in enquiry under S. 15—Disposal of property by Insolvent is ground for admitting petition and not dismissing it.

The issues whether the petitioner has made a true and full disclosure of his property would not be pertinent at the inquiry under Section 15, provided the petitioner has given the particulars required with regard to his property, as it is not until after the adjudication that it can be ascertained whether the petitioner had made a true and full disclosure. [P 80, C. 2; P. 81, C 1.]

As a matter of fact there is no material difference between the Act of 1907 and the Act of 1920, with regard to what is required to be proved before it could be decided that the petitioner has a right to present his petition. Under Section 11 (1) of Act III of 1907 the debtor has to state in his petition that he is unable to pay his debts, and if either on the face of the proceedings or on a representation by the opposing creditor the Court is satisfied that this statement is not correct, it can dismiss the petition.

But if the debtor has made a disposal of his property with a view to defraud his creditors who might otherwise have been paid, then the Court is not justified in holding that he is able to pay his debts, but should admit the petition, so that the interests of the creditors may be benefitted by the special powers given to the Court while administrating an insolvent's estate.

S. Y. Abhanker—for Appellant.

Macleod, C. J.:—The petitioner filed a petition under the Provincial Insolvency Act (III of 1907) shortly before Act V of 1920 was passed. The petition, therefore, would have to be proceeded with under the provisions of Act III of 1907. Under Section 14 (1) of the Act, on the day fixed for the hearing of the petition, or on any subsequent day to which the hearing may be adjourned, the Court shall require proof that the creditor or the debtor, as the case may be, is entitled to present the petition. Under Section 6 (3) the debtor shall not be entitled to present an insolvency petition unless (*a*) his debts amount to five hundred rupees; or (*b*) he has been arrested or imprisoned in execution of the decree of any Court for the payment of money. Under Section 11 (1) every insolvency petition presented by a debtor shall contain a statement that the debtor is unable to pay his debts.

When the petition came on for hearing the following issues were raised: (1) whether the petitioner has made a true and full disclosure of his property, (2) whether his debts amount to Rs. 500, and (3) whether he is unable to pay them. Under Section 15 (1) where the Court is not satisfied with the proof of the right to present the petition, or of the service of notice on the debtor, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

The issue whether the petitioner has made a true and full disclosure of his property would not be pertinent at the inquiry under Section 15, provided the petitioner has given the particulars required with regard to his property, as it is not until after the adjudication that it can be ascertained whether the petitioner has made a true and full disclosure.

The trial Judge seems to have dismissed the petition on the very ground on which he ought to have entertained it, namely, the unsatisfactory conduct of the debtor with regard to his property, for it would only be by the administration of the estate in insolvency that the claims of the creditors could be properly protected. He also thought that the debtor had not satisfied the Court that he was unable to pay his debts, but we think that this finding was based on wrong grounds.

In appeal the joint Judge dealt merely with the question whether the debtor was unable to pay his debts, and though it was rightly held that the insolvency should proceed under the provisions of Act III of 1907 he appears to have thought that the new Act had made a change with regard to what was required to be proved before it could be decided that the petitioner had a right to present his petition. As a matter of fact there is no material difference in this respect between the Act of 1907 and the Act of 1920. Under Section 11 (1) of Act III of 1907 the debtor

has to state in his petition that he is unable to pay his debts, and if either on the face of the proceedings or on a representation by the opposing creditor the Court is satisfied that this statement is not correct, it can dismiss the petition. But if the debtor has made a disposal of his property with a view to defraud his creditors who might otherwise have been paid, then the Court is not justified in holding that he is able to pay his debts, but should admit the petition, so that the interests of the creditors may be benefitted by the special powers given to the Court while administering an insolvent's estate.

The order of remand was rightly made though the reasons given for making it were not correct. Therefore, we dismiss the appeal. When the trial Court takes up the petition again according to the order of remand made by the lower appellate Court, the learned Judge will no doubt, deal with the petition in the light of our remarks.

Appeal rejected.

A. I. R. 1922 Bombay 81.

MACLEOD, C. J. AND SHAH, J.

Rajmal Ramnarayan—Plaintiff-Appellant v.

Budansaheb Abdulsaheb — Defendant-Respondent.

F. A. No. 235 of 1920, decided on 11th November, 1921, from a decision of 1st Class Sub-Judge, Sholapur in Suit No. 175 of 1919.

(a) *Evidence Act, Ss.* 101, 102, 103—*Suit on contract—Defence of wager*—Onus *is on the defendant to prove it—Contract Act, S.* 30.

In contracts, the burden of proof, that they are of wagering nature, is on the person who takes that defence. [P. 81, C. 2.]

(b) *Witness—Party not examining himself as witness—Adverse presumption can be drawn against him—Evidence Act, S.* 114.

If the defendant does not choose to go into the witness-box on his own behalf, that is a matter for himself to decide, but in an ordinary case, the Court is entitled to consider that as a point against the defendant. One party is not bound to issue a summons to the other, and unless the latter gives evidence on his own behalf so as to give the former an opportunity of cross-examining him, the Court is entitled to infer everything against him. [P. 81, C. 2; P. 82, C. 1.]

Coyajee with *G. N. Thakor*—for Appellant.

Bahadurji with *G. P. Murdeshvar*—for Respondent.

Macleod, C. J.:—The plaintiff sued for damages in respect of certain contracts for the purchase and sale of yarn. The contracts were admitted. The only defence that the defendant could take was that the contracts were wagering. The hearing of the case followed rather a peculiar course. On the 3rd February, 1920, the suit was placed for hearing and although the parties were present, the plaintiff was not examined by his pleader but was examined for the Court. Also the defendant was examined for the Court on the 15th. Then, although each party has issued summonses to witnesses, none of the witnesses turned up and eventually on the 1st March, 1920 the defendant's pleader put in a most remarkable *purshis*.

"There is now no necessity for the defendant to state anything more to the Court than what he has (already) stated to this Court on solemn affirmation. The defendant is not responsible to keep himself in attendance for cross-examination and the suit has not come to that stage, that is to say, that 'stage of procedure.' No steps whatever have been taken heretofore on behalf of the plaintiff for examination of the defendant. The defendant now objects to the grant of time to the plaintiff for that purpose. The burden of proof as regards the first issue is thrown on the defendant. No additional evidence is to be given just now on behalf of the defendant."

It was very clear that the *onus* of proving that the contracts were wagering lay on the defendant. All that was said in his deposition before the Court was that the contracts were of a wagering nature. That of course was not proof of the fact asserted. He would have to show that at the time the contract was entered into, the common intention was not to give and take delivery but to pay differences. The *purshis* continues:—

"The defendant reserves the evidence which he is entitled to give by law by way of rebuttal against the evidence that may be given on behalf of the plaintiff."

The defendant also seems to have considered that he was not bound to go into the witness-box to be cross-examined by the plaintiff, but that the only way for the plaintiff to get his evidence was by issuing a summons to the defendant himself. If the defendant did not choose to go into the witness-box on his own

behalf, that was a matter for himself to decide, but in an ordinary case, the Court is entitled to consider that as a point against the defendant. Certainly if a defendant says "I am not going into the witness-box unless I am summoned by the plaintiff" he puts himself in the wrong. For the plaintiff is not bound to issue a summons to the defendant, and unless the defendant gives the evidence on his own behalf so as to give the plaintiff an opportunity of cross-examining him, then the Court is entitled to infer everything against the defendant.

Thus the defendant has absolutely failed to prove what he was bound to prove, in order to succeed in his defence that the suit transactions were of the nature of wagering contracts. The result must be that the appeal must be allowed and the plaintiff will have a decree for Rs. 18, 201-4-0 and costs throughout.

Appeal allowed.

A. I. R. 1922 Bombay 82.

MACLEOD, C. J. AND SHAH, J.

Jogidas Babu—Accused-Appellant

v.

Emperor—Respondent.

Cr. A. No. 664 of 1921, decided on 15th November, 1921, from a conviction and sentence passed by S. J., Khandesh.

Penal Code, S. 467—Forgery — Receiving money-order addressed to another—Making false signature of the payee—Payee not informed by the receiver—Offence is proved.

An offence of forgery under Section 467, I. P. C. is committed when a person receives the amount of the money-order from the postman by causing the signature of the payee to be made falsely on it and does not inform the payee about the receipt of the same. [P. 82, C. 2.]

G. N. Thakor—for Appellant.

S. S. Patkar—for the Crown.

Macleod, C. J.:—The first accused in this case was convicted of an offence under Section 467 of the Indian Penal Code, in that he received Rs. 38 which were despatched by one Hari Lahanu Sonar to his son Bhila by Money Order, by inducing the accused No. 2 to sign as if he were Bhila. The accused was asked by the postman whether one Bhila was living in his village, and the accused No. 1 then told the postman that accused No. 2 was Bhila. Whereupon accused No. 2 signed the receipt for the money which came to the hands of the first accused. There was no dispute as regards the facts and considering the relations between the post office and the public there would be extreme difficulty for the first accused to satisfy the Court that he had no dishonest intention or no intention to cause damage or injury to the public or to any person or that generally the provisions of Section 463, Indian Penal Code, would not apply.

I doubt myself whether the accused in a case like this would be even entitled to urge that he committed no offence because what he did only resulted in money going straight to his pocket which would have eventually been given to him when paid by the post office to Bhila.

Speaking for myself, I should say that when the accused induced the postman to accept the signature of accused No. 2 as the signature of Bhila, and by that action got the money the offence was committed. I do not think that we should interfere with the finding of the Judge that the first accused did not tell Bhila that the money was received. If, immediately after receiving the money from the postman, the first accused had told Bhila Hari that the money which was despatched to him by his father in order that it might be paid to the first accused had been received, then the proof of that fact could certainly be urged in mitigation of the punishment.

I do not think for a moment that that fact, even if proved, would be sufficient to justify the Court in deciding that there was no evidence at all of the offence having been committed. I think, therefore, the conviction is right.

The next question is whether the sentence imposed by the Sessions Judge should be interfered with. On general principles I am very loth to interfere with the sentences given by the lower Courts unless it can be shown that a sentence has been imposed without any regard to the facts of the case or the nature of the offence, or is so out of proportion to the facts proved that no Judge would reasonably impose it.

Considering that the Judge was of opinion that the first accused did not tell Bhila Hari that the money was paid, and there was even evidence which made it probable that the second payment had been made, although he has given the accused the benefit of the doubt with regard to that fact, I do not think that

the sentence which was imposed upon the first accused was one which should be interfered with. I would, therefore, dismiss the appeal.

Shah, J. :—I agree that the appeal must be dismissed. The point which presents some difficulty to my mind is whether it is shown that the appellant acted fraudulently so as to bring the case within the scope of the definition of forgery. It is essential, in my opinion, that the prosecution ought to establish that the act attributed to the accused was fraudulent or dishonest. If, in the present case, for instance, after receiving money, it was clear on the record that he had given intimation of the receipt of money to Bhila and that in substance and in effect the money was received by the accused on behalf of Bhila, speaking for myself, I should say that the conviction would not be right.

But it is far from clear on this record that after receiving the money he ever informed Bhila of the fact as he would have done if the postal receipt was not dishonestly or fraudulently signed. Bhila and his father denied that any such intimation was given to Bhila. It appears from their conduct in making inquiry at the post office after the payment was made that Bhila was not informed of the fact. This omission on the part of the appellant supports the inference drawn by the trial Judge as to the fraudulent intention of the accused.

On these grounds I think that the conviction of the appellant is right ; and the sentence cannot be said to be unduly severe or inappropriate on the facts of the case.

Appeal dismissed.

A. I. R. 1922 Bombay 83.

MACLEOD, C. J. AND COYAJEE, J.

Kashibhai Kalidas Patel—Plaintiff-Appellant

v.

Vallabhai Wagibhai Patel—Defendant-Respondent.

S. A. No. 331 of 1921, decided on 11th January, 1922, from a decision of the Asst. J., Ahmedabad in Appeal No. 556 of 1917.

Specific Relief Act **(1 of 1877), S. 56—*Projection of eaves—Discharging rain-water—Enjoyment a little short of twenty years—Injunction to restrain further enjoyment will not be barred.***

Plaintiff K had an open piece of land adjacent to her house. In November 1896, Defendant V built his house in doing which he projected the eaves of his house overhanging the plaintiff's land and discharged rain-water thereon. In July 1916 " Defendant intended to sink his cess-pool in the land." Plaintiff sued to obtain perpetual injunction to restrain him from discharging rain water and from making the intended cess-pool ; and to remove the projection.

Held that no general rule can be laid down in such cases of long acquiescence. If it does not appear that there will be more expense to the defendant in obeying the injunction than there would have been if the application had been made shortly after the defendant erected his building, the Court ought not to penalise the plaintiff for his neglect to assert his right earlier. The defendant erects his building in defiance of the plaintiff's right and he does so at his own risk. (1888 P. J. 212) Referred to. [P. 84, C. 1.]

G. N. Thakor—for Appellant.

G. S. Rao—for Respondent.

Macleod, C. J. :—The plaintiff sued to obtain various perpetual injunctions against the defendant. The first was to restrain the defendant from discharging rain water on to plaintiff's land at a particular place. The second was an injunction to the defendant to remove the projection over the *khadki* wall and the suit land. The third was to restrain the defendant from making the intended *dattan* (cess-pool).

The plaintiff succeeded in both the Courts in getting an injunction restraining the defendant from making the intended *dattan*, the remaining portions of the claim being rejected. The lower Court had come to the conclusion that because the plaintiff had allowed the defendant's eaves to project and rain-water to be discharged over his land for nearly twenty years, he was thereby barred from coming to a Court of Equity for relief.

The learned appellate Judge went further than this and held that the plaintiff had lost his title to the land up to the line of the defendant's projections, which had existed over twenty years. That would be a very startling decision and it was obviously wrong.

All that the defendant could acquire by prescription would be an easement imposing the burden on the servient tenement of having that projection over it. Even if he acquired the right to project his roof over the plaintiff's land and to discharge rain-water over the plaintiff's land, he could not acquire

title to the plaintiff's land. His rights would be in the nature of an easement, which he could only acquire either by grant, or by prescription and it is admitted by the defendant that he had not acquired any easement.

It has been argued before us that owing to the long acquiescence by the plaintiff of this trespass against his rights, although it had not continued for twenty years, the Court will not grant an injunction. Reliance is placed on a decision of this Court in *Vithoba Raghunath Sonar* v. *D. Anna Rozario Mondosa* (1). In that case the Court said:—

"However, it appears that the plaintiff has acquiesced in the falling of the water on his land for many years; and under these circumstances we think that, having regard to Section 56, Clause (4) (*sic*), of the Specific Relief Act, and injunction restraining the defendant from allowing it to fall ought not now to be granted."

Clause (*h*), if that was referred to, relates to the prevention of a continuing breach in which the applicant has acquiesced; Clause (*j*) is applicable when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court. We do not think that any general rule can be laid down in such cases. The statute of Limitation entitles the plaintiff to seek relief by means of an injunction against a party seeking to establish an easement against him within twenty years. Admittedly there may be cases where it would be inequitable on account of the plaintiff's acquiescence over a period of less than twenty years to grant the relief. If on account of the acquiescence the cost of obeying the injunction would be very much greater than it otherwise would have been, or even prohibitive, then I agree that the Court ought to penalise the plaintiff for his neglect to assert his right earlier. But there is no such equity in this case. It does not appear that there will be any more expense to the defendant in obeying the injunction than there would have been if the application had been made shortly after the defendant erected his building. The defendant must have erected his building in defiance of the plaintiff's rights and he did so at his own risk.

We think, therefore, that the appeal must be allowed and there must be, in addition to the injunction already granted by the trial Court, an injunction restraining defendant from projecting his roof over the plaintiff's land and from discharging rain-water from it on to the plaintiff's land.

The appellant to get his costs.

Appeal allowed.

(1) (1888) P. J. 212.

A. I. R. 1922 Bombay 84.

MACLEOD, C. J. AND KANGA, J.

Dinkerrao Ganpatrao and another—Plaintiffs-Appellants

v.

Narayan Vishwanath Mandalik and another—Defendants-Respondents.

O. C. J. Appeal No. 103 of 1921, decided on 20th March, 1922, from an order of Pratt, J.

(a) *Specific Relief Act, S. 42—Declaratory relief—Originating summon—Court can grant declaratory relief in—High Court Rules, R. 214.*

In the matter granting declaratory relief, the proper procedure to be followed is regulated by Civil Procedure Code and High Court Rules. By High Court Rule 214, which is the chapter dealing with proceedings by way of originating summons it is clear that the Court can pass a declaratory decree in originating summons provided that case falls within Section 42 of the Specific Relief Act. [P. 86, Cs. 1, 2; F. 91, C. 2.]

(b) *Pre-emption—Contract for, creates an equitable interest in land and not merely a personal covenant—Transfer of Property Act, S. 14—Principle applies to such contracts—Contract Act, S. 23.*

There was an agreement that, if the vendees of certain land sold for building thereon, wanted to sell it, it must be sold to the vendor at the original price and the building at the price agreed upon. The contention was that the covenant was void being against the rule of perpetuity.

Held, that agreement is not merely a personal contract; though it creates no interest in land, it creates rights which are capable of being enforced with regard to the land in certain circumstances against third parties and to that extent, they are not ordinary personal covenants. In respect of contract of the transfer of property by way of sale or pre-emption it must be held on general principles of jurisprudence that there should be some time limit beyond which the performance of contract must not be allowed to be held in suspense or postponed. Although Section 14 of the Transfer of Property Act deals only with transfer, the provision of that section could in some cases be practically defeated if

covenants are not held to be void for remoteness on the ground that by themselves they create no interest in property. The same rule should be applied to a case, not of specific performance, but of declaration of right The law in England and India is substantially the same with regard to the enforcement of the contract. If such a contract, purports to do by indirect means what the law forbids to be done directly, it is void.

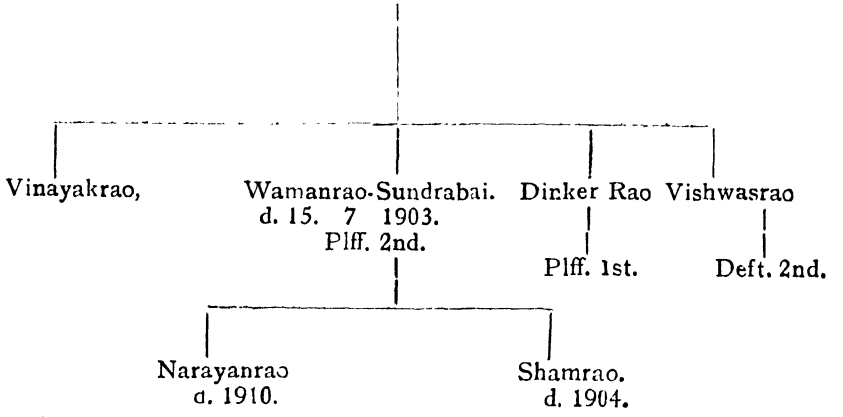
[P. 88, C. 1; P. 89, C. 1; P. 94, C. 1.]

Invereity, *Rangnavker* and *Brahmanker* — for Appellants.

Thomas Strangman, *Coltman* and *Bhadaskar*—for Respondents.

Macleod, C. J. :—This is an appeal from the decision of Pratt, J. in an Originating Summons. The facts are that on the 18th September, 1878 one Vishwanath Narayan Mandlik conveyed to one Ganpatrao-Bhasker Kothare a plot of vacant land measuring 2843 square yards at Altamount Road for the consideration of Rs. 5,664. This plot formed part of a large piece of land belonging to the vendor. The sale-deed was in *Marathi* and contained certain covenants purporting to reserve for the vendor, his heirs, *wahivatdars* and donees certain rights of pre-emption, which covenants have given rise to the present dispute. Vishwanath died in 1889 leaving the 1st defendant, his adopted son, as his sole heir and legal representative. Ganpatrao built large Bungalow on the land he had bought. The following pedigree will be useful as showing the descendants of Ganpatrao.

(d. 3—5—1894) Saraswatibai—Ganpatrao (d. 20—12—1893.)



Ganpatrao by his will devised the suit property together with other separate and self-acquired properties to his wife Saraswatibai for her life with remainder to his four sons in equal shares subject to certain trusts for maintenance and residence.

In 1897 Vinayakrao conveyed *inter alia* his share in the suit property to his three brothers. Consequently that share was held by them as purchasers and not as devisees. The suit property has remained undivided, the persons at present entitled to it being Dinkerrao Vinayakrao and Saraswatibai as heirs of her surviving son Narayanrao. For the purposes of partition it became necessary to sell the property, so the plaintiff filed this suit as an originating summons in order to have the rights of the 1st defendant under the sale-deed of 1878 determined by the Court. By Clause 14 (*a*) of the plaint which was added under the directions of the trying Judge, the plaintiff said that the 1st defendant on diverse occasions had asserted that he was entitled to an option to purchase the suit property in accordance with the provisions of the sale-deed of 1878, and differences had arisen which they had endeavoured to settle by negotiation but without success. The provisions of the sale deed referred to above are as follows: —

'In case you or your heirs have to sell the said plot, the sale is to be sold back to me for the above-mentioned value. It is not to be sold to any other person. In case you are informed in writing that I or my heirs or *Vahivatdars* or donees from me are not going to purchase it, then only can you sell it to another person, if you like. But I do not give this right to a purchaser from me. And similarly I do not give the right to the purchaser from any of my heirs or

Vahivatdars from any donee from them. The next clause refers to a water pipe running through the plot to the vendor's bungalow. When you want to sell the building that you are going to build on the said plot you or your heirs or *Vahivatdars* are to accept from me or my heirs or *Vahivatdars* or donees the price of that building that may be settled amicably between ourselves or through punch. The said land is sold to you on the condition that I am to pay as the price of the land, only as much amount as is taken from you now. It may be mentioned as common knowledge that the land which was sold in 1898 at Rs. 2 a square yard is in a neighbourhood where in recent years building land has been sold at prices ranging upto Rs. 100 a square yard.

The question propounded in the summons or determination by the Court was as follows:

'Whether the 1st defendant is entitled as against the plaintiffs and 2nd defendant to an option to purchase the plot of land and the building thereon in the manner provided by the sale-deed of the 18th September, 1878 and made between the Hon'ble Vishwanath Narayan Mandlik and Ganpatrao Bhaskerji Kothare. The summons was admitted by me on the 22nd March, 1921; but, if I had realised how many intricated questions of law were involved within the apparently simple questions propounded, I should have referred the plaintiffs to a regular suit.

The summons came on for hearing before Pratt, J. The first points taken by the 1st defendant were (1) that the summons was premature and (2) that the Court had no jurisdiction to grant a declaratory decree in an originating summons. How the summons could possibly be premature is not quite clear, as obviously the plaintiffs were entitled to endeavour to clear their title to this property. On the second point the jurisdiction of the Court to grant declaratory decree is determined by Section 42 of the Specific Relief Act.

The proper procedure to be followed is regulated by the Civil Procedure Code and the High Court Rules. By High Court Rule 214 which is in the chapter dealing with proceedings by way of originating summons it is clear that the Court can pass a declaratory decree in an originating summons provided the case falls within the provision of Section 42 of the Specific Relief Act and there can be no doubt that on the facts set out in the plaint the plaintiffs are entitled to ask for a declaratory decree.

The learned Judge then proceeded to ascertain the meaning of the covenants in the sale deed of 1878 but he considered that the meaning depended on the intention of the parties. With due respect I do not think that was the correct view to take. The Court has to construe the words of the document as they stand according to their plain grammatical meaning, and whatever the parties may have intended they must be bound by the plain meaning of the words to which they attached their signatures. In conclusion the judgment says 'I therefore construe the covenant as a valid personal contract but creating no rights *in rem*. Plaintiffs cannot get a declaration as to rights under a personal contract and I therefore do not consider whether they are the personal representatives of the covenants against whom the contract can be enforced. The only answer I make to the question is that the covenant creates no right *in rem* affecting the plaintiff's title.' On the judgment a decree was drawn up as follows.

"This Court doth declare that the covenant in the said deed of sale dated the 18th day of September, 1878 does not create any rights *in rem* affecting the plaintiff's title to the said land and building."

The plaintiffs were directed to pay the costs of the 1st defendant. The wording of the decree following the wording of the judgment is not in exact legal phraseology. I presume the learned Judge intended to hold that the covenant did not run with the land so as to be enforceable against any one asserting title thereto. Whether that was a satisfactory answer to the question in the summons or not, both parties are agreed that the covenants do not run with the land but the plaintiff have appealed on the ground that the decision in the judgment that the covenant was a valid personal contract is wrong, and although that portion of the judgment is not embodied in the decree, still there is a decision against them which might well stand in their way in the future.

Undoubtedly the dispute between the parties has been left in a very unsatis

factory condition. If the plaintiffs sell, they may render themselves liable to an action for damages and the decision that there is a valid personal contract may be considered as barring their right to dispute the validity of the contract, while the provisions of Section 40 of the Transfer of Property Act which do not seem to have been considered in the Court below might cause trouble to their purchaser, if it was asserted that he took with notice of the covenants.

It was suggested by the Court that the passage in the judgment, holding that the covenant was a valid personal contract, might be expunged, leaving that question to be decided if necessary by a future suit, but the plaintiffs were anxious to have the question decided in the summons and as it was not contended by the respondent that it was necessary to take evidence we decided to hear the argument. The sale-deed of 1878 in *Marathi* and the covenants are very badly drafted. Still they may be called covenants for pre-emption, but there are separate covenants in different terms with regard to the land and the buildings respectively.

Nothing is said with regard to the rights of the vendor, if the purchaser after creating a building on the land sold desired to sell land and building together, and Mr. Inverarity argued that, in that event happening, there was no right of pre-emption, it might be said that the parties clearly intended that, if the purchaser wished to sell land and building together the vendor had a right of pre emption on paying the original price of the land and the agreed value of the building and that the covenants can be read as having given effect to that intention but covenants of his nature cast a very onerous burden on the covenantor and must be read strictly against the covenantee and as the covenant does not provide for a sale of land and building together I am inclined to think that there is considerable force in the argument. However, even if we acceded to it we should still have to decide the real questions at issue which are

1. Did the covenants in the sale-deed of 1878 create an interest in immovable property.
2. If they did, are they void as against the rule of perpetuity.
3. If they did not, are they void under the rule of perpetuity or the general principles of Hindu or English law.

According to the English Law these covenants would create an executory interest in the immovable property which would be void as offending against the rule of Perpetuity. *L. & S. W. Ry. Co.* v. *Gomm* (1). But under Hindu Law which governed the parties to the sale-deed neither equitable interests nor executory interests in immovable property are recognized.

Under Section 54 of the Transfer of Property Act contracts for the sale of land do not create an interest in the land and it would seem to follow that a contract for pre-emption is in the nature of a contract for sale. But before the Transfer of Property Act was passed contracts for the sale of land in cases to which the English Law was applicable did create an interest in land.

By the Registration Act of 1866 no testamentary instruments, purporting to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent of the value of Rs. 100, or upwards to or in immovable property was compulsorily registrable. Although there was no substantive law enacting what instruments created an interest in immovable property, the question would naturally arise when an instrument came before the Court, which it was asserted, required registration.

In *Futteh Chand Sahoo* v. *Lulumbersingh Doss* (2) which was a suit between Hindus, the plaintiff sued for specific performance of a contract to sell immovable property and their Lordships held that it required registration on the ground that it created an interest in immovable property and it does not seem to have been considered whether the English Law might not be applicable to a contract for the sale of land between Hindus.

Under Section 17 (2) (v) of the Registration Act of 1877 any document not itself creating, declaring, etc., any interest on immovable property but merely creating a right to obtain another document which would create, etc., such interest was not compulsorily registrable. Then by Section 27 of the Specific Relief Act of

(1) (1882) 20 Ch. D. 562=30 W. R. 620=51 L. J. Ch. 530.
(2) (1870) 14 M. I. A. 129=16 W. R. P. C. 26= 2 Suther. 467=2 Sar. 709 (P. C.)

1897 an agreement for sale of land would be specifically enforced not only against the person making the contract but against any person claiming under the vendors' title arising subsequently to the contract except a *bona fide* purchaser for value without notice.

By Section 91 of the Indian Trust Act of 1882 a transferee taking with notice of a prior contract in favour of another held a right be obtained under his transfer as a trustee for the previous purchaser who would consequently be in the position of a *cestui qui* trust. Now the Registration Act and Specific Relief Act enact principally adjective law and the natural consequence of enacting adjective law on the assumption, that the substantive law prevailing correspondent with the English Rule of Equity was to create considerable confusion.

For instance a contract which under English Law created on equitable interest in land might also come within the description of the documents referred to in Section 17 (2) (v) of the Registration Act of 1877 and very possibly the Legislature intended to exempt such contracts from Registration but the question whether they were compulsorily registerable or not could not be said to have been definitely settled under the passing of the Transfer of Property Act. Still although, contract for the sale of land which can be specifically enforced immediately or contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future do not according to the law in India create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties and to that extent they are not ordinary personal contracts and stand in a category by themselves.

The question then arises whether the principle which underlies the rule of perpetuities made applicable to this country by Section 14 of the Transfer of Property Act should be applied to this class of contracts. That this question would have to be decided was foreshadowed in the judgment of Bhashyam Ayyangar, J. in *Ramasami Pattar* v. *Chinamasari* (3). In that case a deed of usufructuary mortgage executed in 1892 contained the following covenant.

(3) (1901) 24 Mad. 449.

"If we assign our right over those properties to any one, the land, so delivered possession of to you for appropriating the interest shall be assigned to you alone and it shall not be assigned to any one else. When we assign the land we shall receive 50 *Tomans* more from you and then we shall assign the land for these two accounts together."

"The mortgagee sold his equity of redemption in 1875 and the purchaser's interest was bought at a Court-sale before 1893 by the plaintiff who in 1897 sought to redeem. The mortgagee claimed the right of pre-emption. It was held that the defendant under the covenant and by reason of Section 54 of the Transfer of Property Act had no interest in the property. His only right was a right to enforce specific performance of the contract against the transferee who had taken with notice of the covenant. Plaintiff was not a transferee with notice of the contract the time, for the performance of which, had long since passed without anything been done and the inference was that the right arising under it had been waived, or otherwise discharged. Bhasyam Ayyangar, J. at page 457 said:

"Another question which arises in the case which has not been argued is one of considerable difficulty and importance. That question is whether the covenant for pre-emption in the present case transgresses the rule of perpetuities and is therefore void. Of course if the covenant were construed as one enforceable only during the mortgagor's lifetime, though the mortgage may continue beyond his lifetime, it will not be obnoxious at any rate to the law of perpetuities as based upon English Doctrine. But if the right construction be as I think it is that the parties intended that the right of pre-emption should last until the redemption of the mortgage, the covenant will according to English Law as settled in *L. & S. W. Railway* v. *Gomm* be void, for remoteness;"

Then at page 468—

"That decision proceeds on the principle that a covenant to convey though it does not run with the land binds it and creates an equitable interest in the land in favour of the person entitled to call for a conveyance and that therefore the rule against perpetuity is applicable as much to executory equitable estates in land as to legal estates, In the same case as well

as in the case of *Borlands Trustee* v. *Steel Bros.* (4), it is recognized that the rule against perpetuity has no application whatever to personal contracts and that position is incontrovertible." Then after comparing the English rule of perpetuity with the restriction under Hindu Law on transfer of property the learned Judge, proceeds :—

"The question as to application of the principle of Hindu Law or of the General Doctrine of perpetuities to transaction other than gifts by Hindus has not yet been judicially considered, in any case except possibly in *Chindi Churn* v. *Rani Sidheswari* (5).

But it must be admitted that there is no substantial difference between English and Indian Law in respect of contracts for the sale of immoveable properties and it does seem reasonable and in accordance with principles of general jurisprudence that there should be some limit of time beyond which the performance of contract for the transfer of property by way of sale, pre-emption or otherwise must not be allowed to be held in suspense or postponed.

Although Section 14 of the Transfer of Property Act deals only with transfers, the provisions of that section could in some cases be practically defeated if covenants are not held to be void for remoteness on the ground that by themselves they create no interest in property. I am glad to be able to refrain from expressing any opinion on this difficult and important questions of the application of and the limit of the applications of the doctrine of perpetuities to covenants as it has not been really argued in the case and as in fact it is unnecessary to consider and decide it in the case.

In *Kolathu Ayyar* v. *Ranga Vadhyar* (6), there was an agreement that the covenantor Ausurppon Ammal in the event of selling the property in question should sell it to Appa Vathiar on receiving the value stated and if any building should be erected thereon the cost thereof, but in case they did not desire it she could sell it away to others according to her pleasure. The suit for the enforcement of the covenant was instituted against the heir of the covenantor. The first question was whether the agreement was enforceable against the heir of the covenantor. Their Lordships said :

"We are of opinion that if no time is fixed within which the agreement to convey is to be enforced, the contract must be held to be invalid, as infringing the law of perpetuities. This is undoubtedly the rule in England. A mere personal contract cannot be questioned on the ground that it is obnoxious to the rule. But a contract, which gives the promisee an executory interest in land, is as much liable to the objection as a grant of land itself, because the promisee obtains by virtue of the contract an equitable right in the land, "Dealing with the objection that in India there were not two classes of estates, equitable and legal their Lordships thought that there was no substantial difference in the law to be applied to the case as the benefit of an equitable estate was in substance given to a person in whose favour a promise to convey lands had been made. Referring to *S. E. Railway* v. *Associated Portland Cement Manufacturers* (7), and *Kalimadden Bhaya* v. *Reazuddin Ahmed* (8), their Lordships thought that if a man promises that he and his heirs will convey the promise may be enforced according to these cases against himself, *i.e.*, the promise might be treated as devisable so as to make it enforceable against him though it may not be enforceable against the heirs. That question however does not arise in this appeal.

In *Maharaj Bahadursing* v. *Balchand* (9), the proprietor of a hill agreed with a Society of Jains that if the Society should require a site thereon for the erection of a temple, he and his heirs would grant a site free of cost. The proprietor thereafter alienated the whole hill. The Society sued the alienees for possession of a site defined by boundaries alleging notice to the proprietor requiring that site and that they had taken possession but had been dispossessed. The High Court at Patna held that the plaintiff had failed to prove any title to the land in suit. On appeal to the Privy Council their Lordships said—

"For the appellants to succeed it is essential to show that this agreement created in them some pre-

(4) (1901) 70 L. J. Ch. 51=1 Ch. D. 279=49 W.R. 120.
(5) (1889) 16 Cal. 71=15 I.A. 149=5 Sar. 231 (P.C.).
(6) (1913) 38 Mad. 114=24 M.L.J. 84=18 I. C. 203=1913 M.W.N. 163.
(7) (1910) 1 Ch. 12=79 L. J. Ch. 150=54 S. J. 80=101 L.T. 865.
(8) (1909) 10 C.L.J. 626=4 I.C. 743=14 C.W.N. 295.
(9) A.I.R. 1922 P.C. 165=48 I.A. 376 (P.C.).

sent estate or interest which would prevent the Raja from having made the grant. That could only be effected by reading the compromise as creating in the Jain Society a grant in perpetuity of the Parasnath Hill. This cannot however be supported. Such a covenant as this does not and cannot run with the land and could not be so enforced. Further if the case be regarded in another light, namely, an agreement to grant in the future whatever land might be selected as a site for temple, as the only interest created would be one to take effect by entry at a later date, and as the date is uncertain, the provision is obviously bad as offending the rule against perpetuities for the interest would not then vest *in presenti* but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period.

The case is peculiar because the plaintiff did not sue for specific performance but on title, alleging apparently that the agreement amounted to a grant. But the judgment indicates that in spite of Section 54 of the Transfer of Property Act the agreement could be read as creating an interest of such a nature as to bring the agreement itself within the rule against perpetuities.

It is regrettable that so much confusion should still exist owing on the one hand to the fact that the law in India does not recognise equitable interests in land which on the other hand recognises that contracts with regard to land can be specifically enforced against third parties in certain cases. The result is that the law in England and India is substantially the same with regard to the enforcement of the contract. The only difference is that in England the owner of equitable interest is considered as the owner of the property contracted to be conveyed. But no such result can follow from a contract creating an executory interest. If such a contract purports to do by indirect means what the law forbids to be done directly, it is void according to the principle and the principle is the same in India as in England.

By the covenant in suit the vendor purports to give his heirs a right to buy the land and at the price he got for it, and the buildings at a price to be agreed upon. In my opinion it is void and the plaintiffs are entitled to a declaration to that effect.

The appellants will get their costs of the appeal.

Kanga, J.:—I agree in the judgment just delivered by my Lord the Chief Justice.

By a sale-deed dated the 18th day of September, 1878, one Vishwanath Narayan Mandlik conveyed to one Ganpat Rao Bhasker Kothare a plot of land situated at Altamount Road Cumballa Hill.

In the sale-deed two clauses were inserted in the following terms:—

"In case you or your heirs have to sell the said plot, the same is to be sold back to me for the above-mentioned value. It is not to be sold to any other person. In case you are informed in writing that I or my heirs or *Vahivatdars* or donees from me are not going to purchase it, then only you can sell it to another person if you like. But I do not give this right to the purchaser from me. And similarly I do not give this right to the purchaser from any of my heirs, *Vahivatdars* or donees."

"When you want to sell the building that you are going to build on the said plot, you or heirs or *Vahivatdars* are to accept from me or my heirs or *Vahivatdars* or donees the price of that building that may be settled amicably between ourselves or through *Punch*. The said land is sold to you on condition that I am to pay as the price of the land only as much amount as it is taken from you now. This sale-deed is agreed to by our heirs, representatives, etc. I have given this sale-deed in writing of my free will and pleasure."

Ganpatrao Bhasker Kothare built on the said plot of land a large Bungalow with out-houses. Vishwanath Narayan Mandlik, the covenantee, died in the year 1889, and the first defendant is his adopted son and as such his sole heir and legal representative.

Ganpatrao Bhasker Kothare the covenantor died on the 29th December, 1893, leaving him surviving a widow, Saraswatibai and four sons Vinayak, Waman, Dinker, the 1st plaintiff and Vishwasrao, the 2nd defendant. He left a will, dated 27th November, 1893, whereof he appointed his widow Saraswatibai and his said four sons executors. By the said will he bequeathed all his

immoveable properties including the said plot of land and the building thereon to the said Saraswatibai for her life-time and after her death to his four sons absolutely in equal shares subject to certain trusts for maintenance and residence. The said will was duly proved and probate thereof obtained from this Court on the 18th April, 1894.

The said Saraswatibai died on the 3rd May, 1894.

By a writing, dated the 23rd September, 1897, the said Vinayakrao conveyed *inter alia* all his right, title and interest and all the property bequeathed by the will of his father to his three brothers. The said Wamanrao died on or about the15th July, 1903, leaving him surviving two sons, Narayan and Shamrao and his widow the 2nd plaintiff and three daughters.

The said Shamarao died unmarried in the year 1904 leaving the said Narayan as the sole surviving co-parcener.

The said Narayan died unmarried in or about May 1910, leaving as his sole heir according to Hindu Law his mother the 2nd plaintiff. The plaintiff and the 2nd defendant being desirous of selling the said property for the purpose of dividing the net sale proceeds amongst themselves have taken out this originating summons for the determination of the question whether the 1st defendant is entitled as against the plaintiff and the 2nd defendant to an option to purchase the plot of land and building thereon in the manner provided by the said sale-deed.

A preliminary objection to the originating summons was taken by the Advocate-General who appeared for the 1st defendant to the effect that the plaintiff and the 2nd defendant could not in law ask for a declaration that the 1st defendant was not entitled to a right of pre-emption. He argued that the plaintiffs and the 2nd defendant were by this summons praying for a declaration that the 1st defendant was not entitled to a right of pre-emption and that the plaintiffs were not entitled to do so by a suit, much less by an originating summons.

He relied upon Section 42 of the Specific Relief Act and on the decision of the Privy Council in the case of *Charan Das* v. *Amir Khan* (10). By Section 42 of the Specific Relief Act it is provided that—

"Any person entitled to any legal character, or to any right as to any property may institute a suit against any person denying or interested to deny his title to such character or right and the Court may in its discretion make therein a declaration that he is so entitled."

In this case the plaintiffs say that they and the second defendant are entitled to the property free of any claim of the 1st defendant to the sale and that the 1st defendant is asserting a right of pre-emption and denying the plaintiffs' and the 2nd defendant's right to sell the properties to any person they like and ask for a declaration that the title of the plaintiffs is not affected by the covenant contained in the aforesaid clauses, of the sale-deed.

It cannot be said that the plaintiffs are able at present to seek further relief than a mere declaration of title. The plaintiffs therefore in my opinion are under Section 42 of the Specific Relief Act entitled to sue for a declaration that the title of the plaintiffs to the land is not effected by the covenant contained in the aforesaid clauses of the sale-deed and that the first defendant is not entitled to a right of pre-emption and there is nothing in the Privy Council case above cited disentitling the plaintiffs from suing for such a declaration.

If then the plaintiffs are entitled to ask for such a declaration by a suit under Rule 214 of the High Court Rules they are entitled to ask for the same by an originating summons.

In *Evans* v. *Levy* (11) a declaration was made under Order 54-A, Rule 1 of the rules of the Supreme Court on an originating summons that a condition which a lessor had imposed with regard to a license to assign was unreasonable and that the lessee was entitled to assign without any further consent of the lessor. Order 54-A, Rule 1 is exactly in the same term as the Rule 214 of the High Court Rules. Now it is clear that the covenant or pre-emption in this case is not a covenant which runs with the land at Law: See Spencer's case and Smith's Leading Cases, Vol. I, P. 55.

The covenant in this case is a contract to convey the land and the buildings to the covenantee or his heirs,

(10) A. I. R. 1921 P C. 50=48 Cal. 110.

(11) (1910) 1 Ch. 452=102 L. T. 128=79 L. J. Ch. 383.

Vahivatdars or donees in future upon the happening of an event, *viz.*, an intended sale by the covenantor or his heirs. In other words a right of pre-emption or first refusal to arise on an intended sale is given to the covenantee or his heirs.

It was contended by Mr. Inverarity that such a covenant created an interest in the land and was subject to the rules against perpetuities and was void and that even if it did not create an interest in the land it was void under Section 23 of the Indian Contract Act as being opposed to the Policy of the Law prohibiting all devices which tended to create a perpetuity.

Counsel for the 1st defendant contended that it was merely a personal covenant and was not within the rule against perpetuities and that under Section 54 of the Transfer of Property Act and according to the law in force prior to the Transfer of Property Act a contract for the sale of immoveable property did not of itself create any interest or charge on the property contracted to be sold.

At the date of the sale-deed the Transfer of Property Act was not in force but the Specific Relief Act No. I of 1877 and the Indian Registration Act III of 1877 were in force. According to the Specific Relief Act obligation includes every duty enforceable by law and trust includes every duty enforceable by law and trust includes every species of constructive fiduciary ownership and trustee includes every person holding constructively a fiduciary character. Illustration (*g*) to that section runs as follows :—

"A buys certain land with notice that B has already contracted to buy it. A is a trustee within the meaning of this Act for B of the land so bought." Section 27 of the Specific Relief Act provides that specific performance may be enforced against either party to a contract or any other person claiming under him by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract. By Section 13 of the same Act it is laid down that notwithstanding anything contained in Section 56 of the Indian Contract Act a contract exist wholly impossible of performance at these a portion of its subject-matter is nothing at its date, has ceased to exist because time of the performance. Illustration (*a*) to that section runs as follows :—

"A contracts to sell a house to B for a lac of rupees. The day after the contract is made the house is destroyed by a cyclone. B may be compelled to perform his part of the contract by paying the purchase-money."

This illustration assumes that the contract for the sale of a house transfers the beneficial interest in the house to the buyer and makes him in equity the owner of the house. According to Section 55 (5) of the Transfer of Property Act the risk of destruction is borne by the buyer only from the date the ownership passes to him and the ownership according to Section 55 (1) (d) of the Transfer of Property Act passes on execution of a conveyance by the seller. The illustration cannot be applied in cases where the Transfer of Property Act is applicable.

Under the Indian Registration Act XX of 1866 an agreement of sale of immoveable property between Hindus was held to be an agreement creating an equitable interest in land and requiring registration. Under Section 17, Clauses (*i*) of that Act : see *Futteh Chand Sahoo* v. *Loolumber Singgh Doso* (5). By Clause (*h*), Section 17 of the Indian Registration Act, III of 1877 documents containing an agreement of sale of immoveable property were expressly exempted from compulsory registration. It seems the intention of the Legislature was to exempt from registration agreements which created executory interests in the land and which could not displace a conveyance of the same land obtained in good faith by a transferee without notice and duly registered.

It seems to me that prior to the Transfer of Property Act the law assumed in Illustration (*a*) to Section 13 of the Specific Relief Act that a contract for the sale of immoveable property created an equitable interest in the property and the purchaser the owner in equity was the law in India.

The same opinion is expressed in the note to Section 13 in Pollock and Mulla's Edition of the Specific Relief Act.

Now we have before us an agreement made in 1878 to convey an immoveable property upon the happening of an event which might occur at a more remote period than the lives in being and 18 years afterwards. It is an agreement creating under the Law prior to the Transfer of Property Act an equitable interest in immoveable property which would be void as infringing the rule against perpetuities. See *London and South Western Railway Co.* v. *Gomm* (1) and *Woodall* v. *Clifton* (12).

But even if the law prior to the Transfer of Property Act on this point was the same as that contained in the Transfer of Property Act the result, in my opinion, would be the same. No doubt the rule of English Law, that a contract for sale of real property makes the purchaser the owner in equity of the estate has no application to those parts of India where the Transfer of Property Act is in force, See *Maung Shivo Goh* v. *Maung Inn* (13).

But under Section 40 of the Transfer of Property Act an obligation arising out of the contract and annexed to the ownership of immoveable property but not amounting to an interest therein to the benefit of which a third person is entitled could be enforced against a transferee with notice thereof.

The illustration to Section 40 is substantially the same as is Illustration (*g*) to Section 3 of the Specific Relief Act. It is provided by Section 91 of the Indian Trusts Act that a transferee taking with notice of a prior contract in favour of another must hold the right claimed under his transfer as a trustee for the previous promise.

Section 95 of the Indian Trusts Act provides that a person, holding property in accordance with that section must so far as may be, perform the same duties and is subject to the same liabilities and disabilities as if he were a trustee of the property for the person for whose benefit he holds it.

As pointed out by Scott, C. J. in *Bapu Apaji* v. *Kashinath Sadoba* (14) Section 54 of the Transfer of Property Act does not exhaust the relations which flow from a contract for the sale of immoveable property according to Indian Statute Law and the obligation of which a person who has contracted to buy immoveable property has the benefit and which he may enforce against his vendor or transferee with notice, is fiduciary and can be enforced as though the person bound was a trustee. The benefit of an equitable interest is in substance given to a person who has contracted to buy immoveable property. See *Kolathu Ayyar* v. *Ranga Vadhyar* (6).

In my opinion the law laid down in *London and South Western Railway Co.* v. *Gomm* (1) applies to a contract for sale of immoveable property in India even where the Transfer of Property Act is in force. As pointed out by Sir Bhashyam Ayyangar, J. in *Ramasami Pattar* v. *Chinnam Asari* (3) the power of a Hindu under the Hindu Law is more restricted as regards the perpetual tying up of land or property than under the English doctrine of perpetuities.

It was held in *Nabin Chandra Sarma* v. *Rajani Chandra Chakrabarti* (15) following *Nabin Chandra Soot* v. *Nabab Ali Sarkar* (16) and *Sreemuthy Tripoora Soonduree* v. *Juggur Nath Dutt* (17) that a covenant for pre-emption unlimited in point of time is void on the ground that it is obnoxious to the rule against perpetuities. In *Kolathu Ayyar* v. *Ranga Vadhyar* (6) it was held that a contract of pre-emption (with reference to lands) which fixes no time within which the agreement to convey is to be performed cannot be enforced against the heirs of the person who entered into the contract as it infringes the rule against perpetuities.

In a recent Privy Council case *Maharaj Bahadur Singh* v. *Balchand* (9) in compromise of litigation the proprietors of a hill agreed with a Society of Jains that if the Society should require a site thereon for the erection of a temple and *Dharamshala* he and his heirs would grant a site free of costs. The proprietor alienated the whole hill and the Society by their representative sued the alienees for possession of a site defined by boundaries. It was held by their Lordships of the Privy Council that the covenant did not run with the land and could not be

(12) (1905) 2 Ch. 257=54 W.R. 7=74 L.J. Ch. 555.
(13) A. I. R. 1916 P. C. 139=44 I. A. 15=44 Cal. 542 (P. C.).
(14) (1917) 41 Bom. 438=39 I.C. 103=19 Bom. L. R. 100 (F. B.).
(15) A. I. R. 1921 Cal. 162.
(16) (1901) 5 C. W. N. 343.
(17) 24 W. R. 321.

enforced and that if the covenant was regarded as an agreement to grant in the future whatever land might be selected as a site for a temple as the only interest created could be one to take effect by entry at a later date and as that date was uncertain the provision was obviously had as offending the rule against perpetuties for the interest would not then vest *in presenti* but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period.

In *Worthing Corporation* v. *Hoather* (18), it was held by Warrington, J. that though an agreement giving an option to purchase land which is unlimited in point of time is not specifically enforceable, it is not invalid at law and damages may be recovered for a breach thereof. According to the Privy Council decision in *Maharaj Bahadur Singh* v. *Balchand* (9), such a covenant is unenforceable as a covenant since it infringes the rule against perpetuities. Perhaps it might be argued that the case of *Maharaj Bahadur Singh* v. *Balchand* (9) was for possession of land and not for damages and that the observations of their Lordships of the Privy Council had no reference to a claim at Law in damages.

But it seems to me that a contract with regard to land which is calculated to defeat the rule against perpetuities which is one of public policy is void under Section 23 of the Indian Contract Act.

The covenant for pre-emption contained in the sale-deed dated the 18th day of September, 1878, is void and the question for the determination of which the originating summons has been taken out should be answered in the negative.

Appeal allowed.

(18) (1905) 2 Ch. 532=4 L. J. R. 1179=75 L. J. Ch. 761=22 T. L. R. 750=95 L. T. 718.

A.I.R. 1922 Bombay 94.

MACLEOD, C. J. AND SHAH, J.

Vinayak Keshav Gulve—Plaintiff-Appellant

v.

Bala Shivram Hingne — Defendant-Respondent.

Second Appeal No. 5 of 1921, decided on 8th December, 1921, from the decision of the Joint J., Poona, in A. No. 327 of 1919.

Adverse possession—Co-owners—Onus *is on person setting up adverseness to prove it.*

Onus lies on the defendants to prove that the plaintiff having proved title, was not entitled to possession of the suit property. [P. 95, C. 1.]

Coyajee and *P. B. Shingne*—for Appellant.

M. H. Mehta—for Respondent.

Macleod, C. J.:—The plaintiff sued for possession of the suit property on the ground that he had purchased it from one Shripati on the 7th February, 1916. The suit property together with certain other property was once in the ownership of Tabaji, who will be found at the head of the pedigree at p. 1. The property was mortgaged in 1880 by Shivram, the son and Bhau, the grandson of Tabaji. In 1882, Shivram redeemed his share while Bhau continued the mortgage by a fresh mortgage, Exhibit 38. If the property was claimed to be joint and remained joint, so that Bhau's mortgage was a mortgage of an undivided half, then it could be said that Shivram and Bhau were tenants-in-common. But that is not the case which has been made out by either side. Clearly the title to half the property which was mortgaged by Bhau remained in Bhau, and the evidence shows that Shivram got possession of his half share. Thus the title remained in Bhau.

The mortgagee, who was called as a witness, no doubt was unable to say when the mortgage was redeemed, but it is found that the mortgage has been redeemed. There can be no question of adverse possession unless the defendants had come into possession not only against the mortgagor, but also against the mortgagee. But they have not been able to prove that that is what has happened. It seems to me that the appellate Court in reversing the decree of the lower Court has attached too much importance to the question of boundaries, although the learned Judge was satisfied that the disputed portion in this suit was in area about half of the land mortgaged in 1880, and that its assessment was about the half of what was then paid by the family.

It seems, therefore, an inevitable deduction that the suit property is the share in the joint

property which fell to Bhau after Shivram had redeemed half the joint property. There is no reason why Shivram's family who are admittedly in possession of one-half should not seek to claim the other moiety without definitely proving that they had been holding that moiety adversely against the world for twelve years. I think, therefore, that the *onus* lay on the defendants to prove that the plaintiff having proved title was not entitled to possession of the suit property.

Therefore, the appeal must be allowed, the decree of the lower appellate Court set aside, and that of the trial Court restored with costs in this Court and the Court below.

Inquiry as to mesne profits from the date of this Court's decree for three years or until possession is given.

Appeal allowed.

A. I. R. 1922 Bombay 95.

MACLEOD, C. J. AND SHAH, J.

Hirachand Khemchand Gujar and others—Defendants-Appellants.

v.

Aba Lala Patil and others—Plaintiffs-Respondents.

Second Appeal No. 574 of 1920, decided on 21st December, 1921, from the decision of the Asst. J., Satara in A. No. 264 of 1919.

Civil P. C., S. 48—Decree nisi *under Dekkhan Agriculturists' Relief Act of 18 of 1879—No need to apply to the Court for decree absolute—Application for decree absolute will not give the starting point for the period under S. 48.*

When a decree *nisi* is passed under the provisions of the Dekkhan Agriculturists' Relief Act, there is no necessity to apply to the Court to have the decree made absolute. The decree-holder should apply for execution at once, and the application to have the decree made absolute would at the best be considered as a step-in-aid of execution, so that the order of the Court cannot be treated as a decree which would form a first starting point for the period of twelve years allowed by Section 48 of the Civil Procedure Code. [P. 95, C. 2]

Coyajee and *P. B. Shingne*—for Appellants.

Desai and *Ratanlal Ranchoddas*—for Respondents.

Macleod, C. J.:—This is an appeal from the decision of the Assistant Judge of Satara, dismissing an appeal from an order made by the Second Class Subordinate Judge in the matter of a *Darkhast* taken out by the plaintiffs in execution of a decree which was passed on the 11th September, 1900. That was a consent decree whereby it was declared that there was a balance of Rs. 1,800 due to the defendants; that it should be paid off by ten yearly instalments from the end of *Falgun* 1831 *Shake*, which would correspond with March 1901; that in case of failure of payment of an instalment the defendant was to wait for one year; and that if during that time the plaintiff did not pay to the defendants the amount of the instalment, in respect of which there was failure of payment, together with interest, then the defendants were to recover the whole of the amount through the Court by selling the mortgaged lands.

Default was made in paying the first instalment, nor was it paid within a year from the date of the default. Therefore, by the terms of the decree, the defendants were entitled to apply in March, 1902, for execution of the decree by selling the mortgaged lands. On the 1st December, 1903, they applied to the Court to have the decree made absolute, and, on the 7th January, 1904, an order was made by the Subordinate Judge making the decree absolute.

Now when a decree *nisi* is passed under the provisions of the Dekkhan Agriculturists' Relief Act, there is no necessity to apply to the Court to have the decree made absolute. The defendants should have applied for execution at once, and the application to have the decree made absolute would at the best be considered as a step-in-aid of execution, so that the order of the Subordinate Judge cannot be treated as a decree which would form a first starting point for the period of twelve years allowed by Section 48 of the Civil Procedure Code.

The defendants issued a *Darkhast* on the 7th August, 1906, another in 1909, and another in 1912. The present *Darkhast* was filed on the 7th June, 1915. That was clearly more than twelve years after March, 1902, when the decree could have been executed by sale of the mortgaged property in consequence of the plaintiffs' default. It is admitted that unless the defendants can succeed in getting the Court to hold that the order of the 7th January, 1904, was a decree which has now to be executed, the present *Darkhast* is out of time. For the reasons already

given, I think that the order of the 7th January, 1904, was merely an order in execution, and not a fresh decree.

The decision, therefore, of the learned Assistant Judge was right and the appeal must be dismissed with costs.

Appeal dismissed.

A.I.R. 1922 Bombay 96.

MACLEOD, C. J. AND SHAH, J.

Ganesh Ramchandra Kulkarni and another —Plaintiffs-Appellants

v.

Laxmibai Venkatesh Narayan—Defendant-Respondent.

Second Appeal No. 912 of 1918, decided on 6th December, 1921, from the decision of Asst. J. Belgaum in A. No. 687 of 1916.

(a) *Civil P. C., S. 11*—Resjudicata—*Suit by a Hindu widow for declaration dismissed as being barred under S. 47, Civil P. C.—Decision is not one on merits and does not bar suit by reversioner for possession.*

Where a suit by a Hindu widow for declaring that a sale in execution was illegal, was dismissed on the ground that the question of sale related solely to execution under Section 244 of Civil Procedure Code of 1882 or Section 47 of 1908.

Held that there was no adjudication on the merits, as between the widow and the purchaser the suit having been dismissed on a preliminary point and that a suit by the reversioners, after the death of the widow for possession against the auction-purchaser is not barred. [P. 97, C. 1.]

(b) Vatan *lands—Bombay Hereditary Offices Act, S 5—Auction sale against widow—Reversioners bound by sale in purchaser is also a* vatandar.

The sale of the *vatan* lands in execution against the widow of a *vatandar* in respect of a decree that had been passed against him is valid and binding upon reversioner provided the auction-purchaser is a *vatandar* of the same *vatan* since the widow would be able to alienate her husband's immoveable property for legal necessity under Section 5 of the Bombay Hereditary Offices Act. [P. 97, Cs. 1, 2.]

Nilkanth Atmaram—for Appellants.

H. G. Kulkarni—for Respondent No. 2.

Shah, J.:—In this second appeal we are concerned only with Survey No. 4 and the eastern half of Survey No. 96 of Kamatnur. These were *Vatan* lands held by Gopal. He died in 1894. In execution of a money decree obtained against Gopal during his life time, the property was put up for sale by the Court and purchased by one Narayan in 1896. He got possession in September, 1897. He was a *Vatandar* of the same *Vatan*. In these execution proceedings the judgment-debtor was represented by his widow. It does not appear whether she raised any objection to the sale in the execution proceedings; but she filed Suit No. 682 of 1897 for a declaration that the sale was illegal. This suit was dismissed on the ground that it was barred by Section 244 of the Code of Civil Procedure of 1882 and that she should have raised the objection in the execution proceedings. The sale certificate does not in terms state whose right, title and interest were put up for sale but it shows that there was a sale of the lands in question. The widow died in November, 1901.

The present suit is filed by some of the reversioners as the heirs of Gopal. The claim is resisted in respect of these particular lands by the defendants who claim under Narayan on the ground that the sale is binding upon the reversioners and that they have acquired a title by adverse possession for over twelve years from the time they got possession in 1897.

The trial Court held that the cause of action accrued to the reversioners on the death of the widow in 1901 and that as the claim was made within twelve years from that time the suit was not time-barred. It further held that as the land was *Vatan* property the sale was inoperative as it was not liable to be sold after the death of the last male holder. Accordingly the plaintiffs' claim in respect of the lands was decreed.

The lower appellate Court has dismissed the plaintiffs' suit on the ground that the question whether the sale was invalid was *res judicata* in virtue of the decision in Suit No. 687 of 1897 filed by Kashibai.

In the appeal before us it is urged that the sale is not binding upon the reversionary heirs of Gopal and that the question is not *res judicata*.

As regards the plea of *res judicata*, the lower appellate Court apparently had only the decree in the suit and not the judgment. A certified copy of the judgment has been put in here as it was not possible to deal with this point satisfactorily without referring to the judgment. The lower appellate Court should have insisted upon having the judgment before deciding the point. It appears from the judgment that the suit was dismissed on the ground that

it related to a question which should have been raised in execution proceedings and that it was barred by Section 244 of the Code then in force. There was no adjudication on the merits of the question. It does not appear that in the execution proceedings the widow had raised any objection to the sale. Thus there was no adjudication as between the widow and the purchaser which could affect the reversioners. The plea of *res judicata*, must, therefore, fail.

As regards the question as to the validity of the sale, it seems to us that it was valid and binding upon the reversioners. The auction-purchaser is a *Vatandar*: of the same *Vatan*; and an alienation of these *Vatan* lands by Gopal during his life-time in favour of the purchaser would not have been invalid under Section 5 of the Bombay Hereditary Offices Act. But Gopal did not effect any alienation during his life-time.

The widow inherited her husband's property including these *Vatan* lands. She would be able to alienate her husband's immoveable property for legal necessity, and though there would be a special restriction on her powers in virtue of Section 5 of the Bombay Hereditary Offices Act, she might be able to deal with the *Vatan* property as a Hindu widow for legal necessity provided the alienee was *Vatandar* of the same *Vatan*. That being her position, it is clear that at the Court-sale the auction-purchaser could get only such right as she could have conveyed by a private sale to him.

At the date of the sale Gopal was dead; and though the sale-deed refers to the lands it seems to me that at the date of the sale the purchaser could get only the right, title and interest of the widow. In the present case the sale was in execution of a money-decree against Gopal. The widow would be bound to pay the decretal debt of her deceased husband: and unless it were proved that she had other moveable estate of her husband from which the debt could have been defrayed the sale would be for a legal necessity and as such it would be binding upon the reversioners.

We have the fact that she allowed the *Vatan* property to be sold in execution of the decree, which she was bound to satisfy. An alienation by her for that purpose would be binding upon the reversioners and I do not see any reason why the Court-sale should not convey such title as a sale by her for the purpose could have conveyed. On the whole, therefore, I am of opinion that the sale was good not only during her life-time, but also against the reversioners.

The decree of the lower appellate Court as regards these lands is right and must be confirmed with costs. The appeal is dismissed.

Macleod, C. J.:—I agree.

Decree confirmed.

A. I. R. 1922 Bombay 97.

MACLEOD, C. J. AND SHAH, J.

Matubhai M. Shah—Applicant

v.

Emperor—Opposite-Party.

Cr. App. for Revision No. 262 of 1921, decided on 16th November, 1921.

Bombay District Municipal Act, Ss. 96 and 97—Charge of offence under S. 96—Offence not proved—Charge cannot be altered into one under S. 97 read with S. 155.

The Magistrate, when once he had come to the conclusion that the offence of the accused of erecting huts on Municipal land without permission did not come within Section 96, could not alter the charge and treat the offence as if it was punishable under Section 97 read with Section 155. [P. 98, C. 2.]

B. J. Desai and *P. B. Shingne*—for Applicant.

Coyajee and *S. V. Bhandarkar*—for Opponent.

Macleod, C. J.:—The accused was charged with an offence under Section 96 (5) of the Bombay District Municipal Act, III of 1901. The complainant, Mr. Shinde, the Secretary of the Ghatkoper Kirol Municipality, alleged that the accused had commenced erecting a number of temporary huts on Survey No. 31 of Ghatkoper village situate within the limits of the Ghatkoper Kirol Municipality without having obtained permission from the Municipality under Clause (1) of Section 96 and thus had committed an offence punishable under Section 96 (5) of the Act.

The Magistrate came to the conclusion that no offence had been committed under Section 96 (5), but on the facts he dealt with the case if the Municipality had given notice to the accused under Section 97, and that the accused not having obeyed the requisitions of the Municipality had committed an offence under Section 155 of the Act, and fined him Rs. 50, or in default simple imprisonment for one

month.

On the 18th January, 1921, the accused wrote to the Municipality that he was a registered occupant of several pieces of land at Ghatkoper, and as such had applied for permission to the Salsette Development Officer to appropriate the said lands to building purposes, and for the purpose of giving facility to the workmen and servants employed by him for developing the land and making roads and plots and for erecting buildings he had commenced erecting temporary sheds and shops, which would be removed after the buildings were erected.

Then he made certain inquiries with regard to the building rules and regulations which had been framed by the Municipality. But for the purposes of this case those inquiries are irrelevant.

In answer to this letter of the 18th, the Municipality, on the 25th of January replied that the permission of the Municipality was equally necessary before proceeding with the work mentioned in the letter under reply. The work in question was, therefore, purely unauthorized and was proceeded with notwithstanding the repeated verbal as well as written warnings given to the accused's staff in charge of the work. Reference was then made to the Municipal rules and bye laws, and the letter concludes,

"Lastly, I may take this occasion to add that if these unauthorized structures are not removed within four days from the receipt of this notice necessary action will have to be adopted against you under the provisions of the District Municipal Act."

On the 27th January, 1921 at a meeting of the Managing Committee under the heading "Buildings erected without permission on Agra Road at Ghatkoper by Mr. Matubhai M. Shah" it was resolved that Mr. Matubhai M. Shah be prosecuted under Section 96 (5) of the District Municipal Act for carrying out building work without obtaining previous permission of the Municipality.

It is obvious, therefore, that the Municipality treated the accused as having commenced to erect a building without giving notice as required by Section 96 (1) or without furnishing the documents and affording the information prescribed by the section, and that therefore he was liable to be charged under Section 96 (5). The learned Magistrate said:—

"I agree with the learned pleader Mr. Shingne in so far that Section 96 is not applicable to huts and sheds although the word 'building' includes huts and sheds as per Section 3 of the Bombay District Municipal Act. If this section is made applicable to huts and sheds Sections 97 and 98 will ever remain dormant and no Municipality will have occasion to use them, and that does not appear to be the motive of the Legislature."

I agree that the view taken by the learned Magistrate was correct. Although under Section 3 (7) "building" would include any hut, shed or other enclosure, whether used as a human dwelling or otherwise, it does not follow that wherever the word "building" is used in the Act it includes a hut or a shed.

Sections 96, 97 and 98 come under the heading in Chapter IX of "powers to regulate building, etc." and it was clearly the intention of the Legislature that while the provisions of Section 96 should apply to buildings in the ordinary sense of the word, special provision was made for huts and sheds whether built for temporary purposes or for a more permanent object, so that when the accused wished to erect huts or sheds for the purposes of his development scheme he was bound to give previous notice to the Municipality.

Then the Municipality might have made certain requisitions, and it is only when any hut or shed or range or block is built without giving proper notice to the Municipality, or otherwise than as required by the Municipality, that the Municipality may give written notice to the owner or builder thereof requiring him within a certain specified time to take down or remove the same or to make such alterations therein or additions thereto as having regard to sanitary considerations, the Municipality may think fit; and it is only when the directions given by the notice have not been complied with, that proceedings can be taken under Section 155 against the person to whom notice has been given.

I do not think, therefore, that the Magistrate, once he had come to the conclusion that the proposed buildings of the accused did not come within Section 96, could alter the charge and treat the offence as if it was punishable under Section 155. All penal provisions of a statute

must be very strictly construed, and it is impossible to say that the accused in this case brought himself within the provisions of that section. I think, therefore, that the conviction was wrong and must be set aside, and the fine, if paid, refunded.

Shah, J.:—I agree. I desire to add that the proceedings in this case having been started under Section 96 (5) of the Bombay District Municipal Act III of 1901, the proper course for the Magistrate was to decide whether the facts necessary to bring the case within the scope of that sub-section were established. It is clear, however, that having regard to the nature of the building set up by the accused, the case would be covered by the provisions of Section 97; under the circumstances the prosecution under Section 96 (5) would not be justified. The learned Magistrate has taken that view; but he has convicted the accused under Section 97, read with Section 155. I do not think that in these proceedings the facts necessary for that purpose have been established, nor is there anything in the case to show that the accused had sufficient notice to meet the case under Section 97, read with Section 155.

The present proceedings must be treated as having been taken under Section 96 (5) and disposed of on that footing. It may be that if the Municipality were so minded, they may be able to give a proper notice under Section 97 and to take further steps against the accused.

Conviction set aside.

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MACLEOD, C. J. AND SHAH, J.

Rama Nana Hagavne—Accused-Applicant

v.

Emperor—Opposite-Party.

Cr. Rev. App. No. 34 of 1921, decided on 22nd July, 1921, from an order of S. J., Satara.

Penal Code, S. 196—False evidence—Use of—Criminal charge—Accused on his defence—'Corruptly,' meaning of.

The accused, who wanted to prove *alibi* in a case in which he was charged with assault, produced as his witness the *patil* of another village to prove his absence in the village at the time of the assault and produced a cattle pound receipt. His defence having been disbelieved, he was charged under Section 196 of the Penal Code for the offence of using false evidence as true 'corruptly.'

Held in giving false evidence on behalf of the accused, the *patil* had a corrupt motive and therefore the accused is guilty of the offence of corruptly using false evidence as true. Corrupt use of the fabricated evidence by the accused came under the scope of Section 196 of the Code, because in order to support his false defence the accused induced a public servant to produce a fabricated document. [P. 101, Cs 1, 2.]

Per *Macleod, C. J.*—It is clear that the use of the false evidence with knowledge that it is false must ordinarily be corrupt from its very nature, and the *onus* lies on the accused to show that there are circumstances in the case which prevent its being corrupt. The fact that he was defending himself against a criminal charge is not enough. [P. 101, C, 1.]

Per *Shah, J.*:—It is difficult to accept the proposition that as a matter of law an accused person can never corruptly use as genuine fabricated evidence so long as he uses it for his defence. While it cannot be held that an accused person when he uses the fabricated evidence as genuine in his defence can never do so corruptly, it is clear that his position as an accused person must be taken into consideration in determining on the evidence in a particular case whether he uses it corruptly or not. [P. 101, C. 2; P. 102, C. 1.]

A. G. Desai—for Accused.

S. S. Patkar—for the Crown.

Macleod, C. J.:—The accused was convicted by the First Class Magistrate, Karad Division, of an offence under Section 196, Indian Penal Code. He was originally charged with having committed an assault on one Dhondi on the 20th July, 1919. His defence was an *alibi* and in support of that defence he produced a cattle pound receipt and called the *patil* of Chindhdli to prove that he was at that village on the day of the alleged assault. The defence was not believed and the accused was convicted. He was then sent for trial together with the *patil* under the provisions of Section 476 of the Criminal Procedure Code. The Magistrate found that the *patil* fabricated evidence in order to save the present applicant and that they both corruptly used that evidence with full knowledge of its false character.

An appeal to the Sessions Judge was dismissed.

We have been asked to exercise our revisional jurisdiction on the ground that it has been held by this Court in *Impera-*

tor v. *Bhausing Jalamsing* (1) that an accused person who uses false evidence which he knows to be false for the purpose of his defence cannot be said to use it corruptly within the meaning of that word in Section 196, Indian Penal Code, unless it can be proved that the witness called to give the false evidence had a corrupt motive. In that case the applicant who had been charged with having committed an assault was found to have used false evidence knowing it was false to support an *alibi* which failed, and was convicted under Section 196, Indian Penal Code. It seems to have been argued in appeal against the sentence that it was necessary to prove that the person charged under Section 196 had illicit inducement, but the Sessions Judge was of opinion that the word 'corruptly' was a mere reproduction of the phraseology of the law of England. On an application for revision to the High Court it was urged that Section 196 of the Indian Penal Code did not apply to the case of an accused person who used false evidence in his own defence.

The argument was supported by a citation from a report of Lord Macaulay upon the Indian Penal Code addressed to Lord Auckland as Governor General. The Court, after reciting the portion of the report relied upon, observed :—

"Our duty is to see whether the facts of this case come within the terms of Section 196 of the Indian Penal Code irrespective of the intentions of Lord Macaulay as appearing from his report."

It seems to me, with all due respect, unfortunate that the Court allowed the report to be mentioned, as it was clearly irrelevant, and still it might tend to influence the Court towards interpreting the section in consonance with it. The Court said :—

"But it is not clear that in so using it (the false evidence) there was any element of corruption. We think that the word 'corruptly' in the section is not used in the sense of 'fraudulently' for in the Penal Code the language is precise and consistent and in Section 471 a somewhat analogous section" we find word 'fraudulently' used to indicate one of the alternative elements in the offence. Nor do we think that 'corruptly' is the same as 'dishonestly' in the sense in which that word is used in Section 24, of having the intention of causing wrongful gain or wrongful loss. We cannot attempt here to give an exhaustive definition of the word 'corruptly' but we think that in the present case, in order to bring the accused within the section, there should have been evidence that the witnesses mentioned in the charge had been induced to come forward by some corrupt motive provided by the accused. Bribery in some form would be a corrupt motive.

"There is, however, in the case so far as we have been able to ascertain, no evidence of the motive which induced the witnesses mentioned in the charge to come forward and give false evidence."

Accordingly the accused was held entitled to an acquittal. It is certainly strange that a decision of such importance was not considered a fit one to be referred to the Reporter. No doubt we must endeavour to attach some meaning to the word 'corruptly' in Section 196. The mere user of false evidence is not sufficient, the user must be corrupt.

There may be cases in which the user of false evidence will not support a conviction, but must the case of an accused person using the false evidence necessarily be one of such cases unless corrupt motive on the part of a false witness is shown? 'Corruptly' is not defined in the Code, but I see no necessity to consider whether it is used in the sense of fraudulently or dishonestly. If the user had to be fraudulent or dishonest the Legislature would have said so. We must give to the word corruptly its ordinary dictionary meaning. 'Corrupt' is an adjective of very general application. It refers to anything which has been changed so as to become putrid, vitiated, tainted. The method by which the change is effected is immaterial, though no doubt because a living person's character becomes vitiated by taking bribes, bribery and corruption have come to be considered as synonymous terms.

But that is due to a confusion in thought between cause and effect, which has led to an inexact use of the word corruption. Morever, bribery is not

(1) (1909) Criminal Revision Application No. 26 of 1909, decided by Scott, C. J. and Chandavarkar, J on 31st March, 1919.

the only cause which produces corruption. The learned Judges held that it must be proved that the witnesses had been induced to give evidence on behalf of the defence from some corrupt motive. I should have thought that the desire to screen an offender from the legal consequences of his act could well be designated a corrupt motive, and it would not require evidence to satisfy the Court that the witnesses in giving false evidence had that desire. But I very much doubt whether the user cannot be corrupt unless it involves the corruption of a third person.

The question must be whether the action of an accused person in using false evidence for the purpose of his defence is of a different character to similar action by any other person. It would never be argued that any person other than an accused person could not be convicted under Section 196 unless it was proved he had procured the false evidence by bribery or that the false witnesses were influenced by corrupt motive.

There must, therefore, if this defence is to succeed, be some element in the position of an accused person which prevents his action being considered as vitiated, tainted or putrid. This can only be if we hold that an accused person is entitled to do what would otherwise constitute an offence because he is on his trial for a criminal offence. If the Legislature intended this, it is unfortunate they did not give a plain effect to their intention, though no doubt it would seem strange to read in the Code, "an accused person who uses false evidence for the purposes of his defence does not use such evidence corruptly."

But, in my opinion, it is clear that the user of false evidence with the knowledge that it is false must ordinarily be corrupt from its very nature and the onus lies on the accused to show that there are circumstances in the case which prevent its being corrupt. The fact that he was defending himself against a criminal charge is not enough.

In *Emperor* v. *Ram Khilawan* (2) the Court expressed the opinion that a man accused of an offence could use or fabricate false evidence with impunity, but in that case the accused had been sentenced to death for murder and also to a sentence of imprisonment under Section 196 and the question, whether the latter sentence was valid, did not require very serious consideration. But in my opinion, to hold that an accused person may use and fabricate false evidence with impunity so long as he does not bribe anyone to assist him would appear to me to open a very wide door to the fabrication of false defences.

We are not entitled to say that the end justifies the means except with the direct sanction of the Legislature. It might have been necessary to refer the case to a Full Bench considering the decision of this Court in *Imperator* v. *Bhausing Jalamsing* (1) but as I am of opinion that it is obvious the *patil* had a corrupt motive in giving false evidence on behalf of the applicant, if we dismiss this application we are to some extent following that decision.

Rule discharged.

Shah, J. :—It is contended on behalf of the applicant that he did not use the fabricated evidence corruptly within the meaning of Section 196, Indian Penal Code, as he used it merely in his defence at his trial on the charge of causing hurt. There can be no doubt that accused No. 1 who produced the document, which is found to be fabricated, used it corruptly. He was a public servant and it is not suggested that his conviction under Section 196, Indian Penal Code, is open to any objection.

It is a reasonable inference under the circumstances that the present applicant, at whose instance the document was produced, induced the *Patil* to use it corruptly, and that in doing so he also used it corruptly. Both the lower Courts have drawn that inference, and in revision I see no good ground to disturb that finding so far as it is based upon evidence.

It is urged, however, that as the applicant acted in his defence and used the fabricated evidence for the purpose of establishing his innocence he could not be said to have used it corruptly. It is difficult however, to accept the proposition that as a matter of law an accused person can never corruptly use as genuine fabricated evidence so long as he uses it for his defence. There is no legislative provision to that effect; for

(2) (1906) 28 All. 705=1906 A. W. N. 191.

instance, Section 342, Criminal Procedure Code, provides that the accused shall not be liable to be prosecuted for giving false evidence in respect of any statement by him as an accused person. There is no provision giving him such immunity as regards the use of fabricated evidence and I do not think that such immunity could be implied in his favour simply because he uses it as an accused person in his defence.

The opinion expressed in *Emperor* v. *Ram Khilawan* (2) no doubt supports the applicant's contention. But with great deference to the learned Judges it appears to me to have been too broadly stated, and must be taken to have been expressed with reference to the special facts of that case. Mr. Desai has also relied upon the decision in *Imperator* v. *Bhausing Jalamsing* (1). I accept the view taken in that case that 'corruptly' is not the same as 'dishonestly' or 'fraudulently.' I do not read the judgment in that case as laying down that an accused person can never be guilty of corruptly using fabricated evidence when he uses it in his defence. In that particular case, the accused was acquitted as there was no evidence of the use being corrupt. But that case does not present any insuperable difficulty in the way of our holding in this case that the use of fabricated evidence was corrupt.

While I am not prepared to hold that an accused person, when he uses the fabricated evidence as genuine in his defence, can never do so corruptly, it is clear that his position as an accused person must be taken into consideration in determining on the evidence in a particular case whether he uses it corruptly or not. It is not necessary for the purpose of this case to define the scope of the word 'corruptly'; but where a public servant has been induced by an accused person to produce a fabricated document in order to support his false defence, it is not difficult to support the inference as to the corrupt use by him of the fabricated evidence as being within the scope of Section 196, Indian Penal Code.

I, therefore, concur in the order proposed by the Chief Justice.

Rule discharged.

A. I. R. 1922 Bombay 102.

MACLEOD, C. J. AND SHAH, J.

Basappa and another—Defendants-Appellants v.

Fakirappa—Plaintiff-Respondent.

S. A. No. 794 of 1920, decided on 5th July, 1921, from the decision of Asst. J., Dharwar in A. No. 27 of 1919.

Hindu Law—Alienation—Gift made by widow with the consent of the next reversioner—Latter is estopped from challenging gift.

Where a Hindu widow made a gift of a portion of her husband's property in favour of her husband's brother's grandson with the consent of her husband's brother, the next reversioner,

Held: her husband's brother was estopped from questioning the gift and it was valid as against him. [P. 103, C. 2; P. 105, C. 1.]

H. B. Gumaste—for Appellants.

S. B. Jathar—for Respondent.

Macleod, C. J.:—The plaintiff sued to recover possession of the land and house specified in the plaint. He alleged that he had two brothers, Ghatigeppa and Basappa, who were divided in interest; that Ghatigeppa died leaving behind him defendant No. 1, his grandson, and defendants Nos. 2 and 3 his sons; that Basappa had a wife Mallawa and a son Dodyella; that the father predeceased his son, and that subsequently the son Dodyella also died without any heirs except his own mother who also died about three months before suit after enjoying the plaint property. The plaintiff further alleged that he was the sole heir after Mallawa's death and that the defendants had been, without any right, holding the property.

The defendants pleaded that Mallawa and plaintiff had passed the plaint property by gift, on the 14th February, 1917, by executing a duly registered instrument in favour of the 1st defendant. The plaintiff in his reply denied having passed a deed of gift along with Mallawa and contended that Mallawa was incompetent to give away the property, and to alienate the same to a person who was not the next reversioner, and that the deed referred to by the defendants in their written statement was executed in the circumstances set forth in para. 2 of Exhibit 16, under misrepresentation without knowing its contents.

The learned trial Judge found that the gift passed by the plaintiff and Mallawa in defendant No. 1's favour was not passed without the plaintiff's understanding the contents thereof; that

it was binding on the plaintiff; that the gift was valid under Hindu Law; and accordingly rejected the plaintiff's claim. The learned Judge said:—

"Thus being a consenting party to the deed, plaintiff is not at all justified and competent to revoke or resume the gift capriciously as he now attempts to do. Plaintiff cannot be allowed to take advantage of his own wrong or mistake as he says, and if any consideration for the transfer of interest were really needed to complete the essentials of Section 43 of the Transfer of Property Act, it is the natural affection which is also referred to in the deed, Exhibit 61. Plaintiff is thus estopped from contesting the validity of the gift and from contending that the deed is not binding upon him and he is incompetent to repudiate the gift and resume the property."

In appeal the learned Assistant Judge, relying on the decision in *Bai Parvati* v. *Dayabhai Manchharam* (1), reversed the lower Court's decree and awarded the plaintiff's claim. Now the case of *Bai Parvati* v. *Dayabhai Manchharam*, (1) was a case in which the widow together with one of her daughters passed a joint deed of gift of the suit property in favour of the children of a deceased daughter's son.

The case was argued on the footing that the deed of gift conveyed the entire property to the donee. But the appellant's counsel contended that as the persons who executed the deed of gift were not entitled between them to the whole estate, Bai Parvati having only a contingent interest in it which she could not convey, the deed was valid only with regard to the life-estate of the widow. Respondent's counsel did not contend that it was a case in which an alienation was made by a widow with the consent of the next reversioner, but maintained that the widow and the next reversioner were competent to convey an absolute estate.

With the case presented to the Court in that way, the Court came to the conclusion that there could not be a transfer of a contingent interest, and that the plaintiff was not estopped from raising the question of law that the Transfer of Property Act did not permit the conveyance or transfer of a *spes successionis*. The question whether the next reversioner was estopped from contesting the validity of the gift by the widow owing to his having consented to it was not argued.

The cases which we have now been referred to decided by the Privy Council, viz., *Rangasami Goundan* v. *Nachiappa Goundan* (2) and *Bajarangi Singh* v. *Manokarnika Bakhsh Singh* (3), were not cited in the course of the argument. In the first case their Lordships laid down that the widow can surrender her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation, but the surrender must be *bona fide* and not a device to divide the estate with the reversioner. In those circumstances the question of necessity does not arise. Nor could it arise in the case of a gift by a widow to an outsider.

Secondly, when an alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to dispute the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one.

In *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (3) this decision was discussed and explained, and it would appear that their Lordships would have approved of the proposition that if all the reversioners in being consent to an alienation by the widow they will be bound by their own consent, and postnati will be held to claim through those that are bound. Their Lordships also pointed out that if the deed of transfer by the widow and the next reversioner be looked upon as a transfer of their respective interests, then it would not transfer the whole estate.

If, therefore, the case is treated as an alienation by the widow with the consent of the next reversioner, then that dictum of their Lordships of the Privy Council would apply, and the plaintiff in this case would be bound by the

(1) (1919) 44 Bom. 488=58 I. C. 266=22 Bom. L. R. 704.

(2) A. I. R. 1918 P. C. 196=42 Mad. 523=46 I. A. 72 (P. C.).

(3) (1907) 30 All. 1=35 I. A. 1=5 A. L. J. 1 (P. C.).

consent which was implied by his being a party to the deed of gift in favour of Basappa. It seems to me, therefore that the decision of the trial Court in the facts of the case was right. The appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

Shah, J. :—I agree. The question of law in this second appeal is whether gift made by a Hindu widow in favour of her deceased husband's brother's grandson with the consent of the next reversioner, who in this case was a brother of her deceased husband, is valid. I state the question in this form, though in the present case the next reversioner, Fakirappa, really joined in the deed of gift in conveying the property to his brother's grandson. No doubt his interest in the property then was contingent and he could not convey such interest to his brother's grandson. But the fact of his having joined the widow in making this gift in favour of the donee necessarily implies his consent to the act of the widow in making the gift.

Therefore it must be treated, in spite of the argument to the contrary urged by Mr. Jathar, as a case of an alienation by way of gift by a Hindu widow with the consent of the next reversioner. It is the very reversioner who now seeks to establish that the gift is not valid; and the question is whether he is bound by the consent which he undoubtedly gave during the life-time of the widow to the gift in question.

The property given by way of gift is not shown to be the whole of the widow's estate, and there is no scope for the application of the doctrine of acceleration by surrender of the estate on the part of the widow.

It is not necessary to examine all the cases which have been referred to in the course of the argument. But referring to the case of *Rangasami Gounden* v. *Nachiappa Gounden* (2) where the earlier decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (3) has been fully considered it seems that as regards the plea of estoppel their Lordships of the Privy Council distinguished *Bajrangi Singh's case* (3) on the ground that in that case all the reversioners in being had consented to the alienations; and that they were bound by their own consent, and that the postnati were held to claim through those that were bound.

In the present case the consenting reversioner himself contests the alienation. It is quite true that in the present case the alienation purports to be a gift. It is pointed out by their Lordships in the earlier part of the judgment in *Rangasami's case* (2) that being a deed of gift, it cannot possibly be held to be evidence of alienation for value for purposes of legal necessity.

In *Pilu* v. *Babaji* (4) it has been stated that ordinarily the consent of the next reversioners would not be sufficient to validate a gift by a Hindu widow, as in the case of a deed of gift there can be no necessity. But in that particular case the question as to whether the consenting reversioner to the gift could question the validity of that gift after the death of the widow did not arise ; and in the case of *Abhesing* v. *Raisang* (5) Mr. Justice Batchelor, who was one of the Judges who decided *Pilu* v. *Babaji* (4) has distinctly emphasized the consideration that that the observations made in that case must be read with reference to the facts of that case.

In *Bai Parvati* v. *Dayabhai Manchharam* (1) no doubt the reversioner contesting the validity of the alienation had consented to the alienation. The consenting reversioner in that case was a female. I do not think, however, that circumstance can afford any basis for distinguishing the case, so far as the point under consideration is concerned. But, as pointed out by the learned Chief Justice, the case was really decided not on a consideration of the plea of estoppel based on consent, but on the ground whether it was competent to the next reversioner in that case to convey her contingent interest during the life-time of the widow.

It is clear that so far there could be no question that the reversioner could not convey such interest. But apparently the point that we have to decide was not considered, though no doubt the case affords an instance in which the consenting rever-

(4) (1909) 34 Bom. 165=4 I. C. 584=11 Bom. L. R. 1291.

(5) (1912) 14 Bom. L. R. 602=16 I. C. 561.

sioner was held to be not bound by the alienation. Beyond this case not a single decision, in which the alienation without any legal necessity to which the next reversioner has consented has been held not to be binding upon that reversioner after the death of the widow, has been cited to us.

Having regard to the observations as to *Bajrang Singh's case* (3) in *Rangasami Gounden* v. *Nachiappa Gounden* (2) at p. 86 of the report, it seems to me that it is open to this Court to hold that the consenting reversioner is estopped from contesting the validity of the gift by the widow to which he has consented.

So far as the consenting reversioner is concerned, I see no substantial difference between a gift and an alienation by way of sale when the legal necessity is negatived on the evidence apart from the consent. In *Vinayak* v. *Govind* (6) though the plea of legal necessity was negatived the alienation of two plots by the widow was upheld on the ground of Venkatesh's consent. In both the judgments delivered in that case it has been pointed out that if Venkatesh had survived the widow he would undoubtedly have been bound by his own consent, and on the facts of that case, the Court held that Venkatesh's consent was sufficient to validate the sale as against the reversioner who was Venkatesh's son.

Apart from the decisions, it seems to me that where, as in the present case, we have a gift by a Hindu widow in favour of the grandson of her deceased husband's brother for whom she would naturally have affection, and where that gift is consented to by the next reversioner, there is no reason why at least the consenting reversioner should not be held bound by his consent, and why he should not be estopped from questioning the validity of such a gift.

Both on general considerations, as also on the decided cases, it seems to me that in spite of the general paucity of reported cases where a gift by a Hindu widow consented to by the next reversioner has been called in question by that very reversioner I think that the gift ought to be upheld as against the particular reversioner who has consented to the gift by the widow during her life-time.

Decree reversed.

(6) (1900) 25 Bom. 129=2 Bom. L. R. 820.

A. I. R. 1922 Bombay 105.

MACLEOD, C. J. AND SHAH, J.

Parvatava—Plaintiff-Appellant

v.

Fakirnaik and others—Defendants-Respondents.

F. A. No. 184 of 1919, decided on 18th July, 1921, from a decision of 1st Class Sub-J., Dharwar in Suit No. 180 of 1917.

Hindu Law—Adoption—Capacity to adopt—Minor widow aged 12½ cannot make valid adoption.

Adoption by minor Hindu widow aged 12½ is invalid. Without attempting to lay down any general rule as to whether at the age of 12½ years a girl could ever make a valid adoption in the absence of any clear evidence as to the special capacity of any particular girl to exercise an independent judgment at that age, it cannot be held that she can exercise such judgment as is required in the case of adoption.

[P. 106, C. 2; P. 107, C. 1.]

G. P. Murdeshwar—for Appellant.

Nilkant Atmaram—for Respondents Nos. 1 and 2.

Macleod, C. J. :—One Parvatava filed Suit No. 180 of 1917 to recover possession of the suit property alleging that it belonged to Nemapa who died in 1917 leaving him surviving the plaintiff, his senior widow defendant No. 2, his junior widow, and defendant No. 4, Kalava his mother, that defendant No. 2 the junior widow adopted defendant No. 3; and that that adoption was false and invalid. The alleged adopted son has filed Suit No. 334 of 1918 asking for a perpetual injunction restraining Kalava, the mother of Nemapa, from obstructing him in the enjoyment of the plaint lands.

The learned Subordinate Judge has found that the marriage between Parvatava and Nemapa was not proved. He also held that the adoption of Adiveppa was proved and valid. If the adoption of Adiveppa is not valid, then the question regarding the marriage of Parvatava and Nemapa becomes of secondary importance, because Kalava, the person principally interested, has given evidence to the effect that the marriage did take place, and as a matter of fact the whole of the evidence with regard to that marriage is all one way.

Now it is admitted that Nilava when she adopted Adiveppa was only 12½

years old at the most. The learned Judge has said:

"I have given the best consideration to the point and have come to the conclusion that if our High Court has decided that a girl of about 15 years could validly adopt, it follows that one of 12½ years could also validly adopt; because between the two girls, capacity to understand such things cannot be substantially different."

I regret I cannot agree with the logic of that decision. The intelligence of a young person in ordinary circumstances will keep on growing year by year, and if the High Court laid down the limit of years of discretion as 15, it certainly would not follow that a girl of 12½ would have attained to the same degree of discretion as a girl of 15. If once you depart from the limit of 15 which of course is purely an arbitrary one, then it would be easy to go back to any extent which would be absurd.

But certainly I should not be disposed to think, taking all the considerations and circumstances and conditions of people of this class into account, that a girl younger than 15 could possibly exercise the volition of mind and that independence of judgment which would enable her to make a really valid adoption. A *fortiori* there would have to be very clear evidence to satisfy the Court that a girl of 12 or 12½ years could exercise her own independent judgment in the matter of an adoption.

In *Murugappa* v. *Kalawa* (1) it was argued on the authority of Mayne that puberty was the test, and I said there "that a girl has attained to puberty may be one circumstance, but in this country not necessarily the only one. The actual age of the widow may be another test and probably the most important one. In this case I think both, the tender age of the widow and the fact that she has not reached the age of puberty, make it perfectly clear that she was not competent to know what she was doing.

If we were to hold that such a person could adopt, we should open the door to all sorts of intrigue, so that the elder members of the family might be able to induce widows of tender age to make adoptions in the interests of those persons; and Mr. Justice Heaton said:

"Certainly no ordinary child of twelve years of age is capable of volition of the kind here required unless he or she is a very exceptional person."

It is not entirely a question of intelligence. A girl of twelve may be exceptionally intelligent, but it is more a question of her power to resist the influence which her elders will exercise, and must naturally exercise, over her actions. However intelligent she might be, she would not be likely to withstand the inducements put forward and the persuasion exercised in order that she should adopt a person according to the wishes of her elders. In this case it is quite obvious that the adoption of Adiveppa, who was the brother of Nilava, could not possibly be considered as an adoption by Nilava, but that it was brought about by the persuasion of others, probably of Nilava's father. Adiveppa's suit must fail.

Then it is not necessary to deal at length with the question of the marriage of Parvatava, because Kalawa the mother has sworn that Parvatava was married, and, therefore, Parvatava's suit must succeed, and she must have a decree for possession of the suit property, and there will be an inquiry as to mesne profits from the date of suit. Although the plaintiff's suit was dismissed the Judge found that Kalava's maintenance should be Rs. 180 a year, and that a portion of the house should be given to her for her residence. That was of course on the footing that the adopted son succeeded.

Therefore we confirm that finding. At present Kalava and Parvatava seem to be living in harmony, but if they separate, then Parvatva will have to provide for the maintenance and residence of her mother-in-law. The appeals are allowed. Suit No. 334 of 1918 is dismissed and Appeal No. 44 of 1921 is allowed with costs throughout. Suit No. 180 of 1917 is decreed with costs throughout against defendant No. 1 who has been fighting the matter.

Shah, J.:—I agree. I desire to add a word with reference to the question as to whether the adoption by Nilava, who was about 12 years and 6 months old at the date of the adoption, is valid or not. Without attempting to lay down any general rule as to whether at that age a girl could ever make a valid adoption, it seems to me clear that in the absence of any clear evidence

(1) (1919) 44 Bom. 327=55 I.C. 361=22 Bom. L.R. 91.

as to the special capacity of this girl to exercise an independent judgment at that age, I am not prepared to hold that she could exercise such judgment as is required in the case of adoption. The evidence in the case as to her capacity is meagre and does not go beyond this that she was an intelligent girl. I am unable to agree with the conclusion reached by the lower Court that because an adoption by a girl at the age of 15 is upheld in one case an adoption by a girl at the age of 12 may also be upheld. I agree with the *ratio decidendi* in *Murgappa* v. *Kalawa* (1).

In the present case we have to decide the question in first appeal; and on the proved facts, I feel no difficulty in holding that the adoption by Nilava cannot be upheld.

Appeals allowed.

A.I.R. 1922 Bombay 107.

MACLEOD, C. J. AND SHAH, J.

Appa Dhond Savant—Defendant-Appellant

v.

Babaji Krishanji Ghogle—Respondent.

Second Appeal No. 535 of 1916, decided on 6th June, 1921 against the decision of Additional 1st Class Sub-J., Ratnagir in A. No. 451 of 1914.

Transfer of Property Act (IV of 1882), S. 41—Benami *transaction—Sale cannot be held to be partly* benami *and partly genuine.*

Benami transactions are generally effected in order to conceal some fraud, or in order to support some object of a discreditable nature. But, though the Courts have in past recognised that the ostensible owner in a *benami* transaction can be ordered to restore the property to its original owner, they would certainly not be willing to extend that doctrine and to hold that a transaction can be partly genuine and partly unreal, unless there are very strong reasons for obliging the Court to some such a conclusion.

[P. 107, C. 2.]

Coyaji with *D. G. Dalvi*—for Appellant.

A. G. Desai—for Respondent.

Macleod, C. J.:—These are two companion appeals in Original Suits Nos. 302 and 325 of 1913 filed in the Court of the Subordinate Judge of Malvan. The claims were rejected in the trial, but were decreed by the lower appellate Court. The property in suit belonged in 1857 to two brothers, Dhondu and Vithal Savant. They conveyed the property by a deed, dated the 9th February 1857, together with two other Thikans to their sister's husband, Raghoji Ghogle, for Rs. 225. The defendants, who resist the claims of the plaintiffs as the descendants of Raghoji are the widow and children of Dhond Savant. They alleged that, with regard to the Thikan in suit, which was called Thikan Modapa, the transaction with the Ghogles was *benami*, and they rely on certain transactions with that Thikan after 1857 to show that it was intended, when all the three Thikans were conveyed, that Raghoji should hold the Modapa Thikan *benami* for the vendors.

The contention, therefore, is that the Court, upon considering the evidence, can split up the contents of a document relating to a transaction regarding immoveable property in order to hold that part of it was genuine, while the other part was *benami*. Considering the time that has elapsed since these lands were conveyed to Raghoji, it seems in any circumstances a difficult task for the vendor's descendants to prove that that transaction was either wholly or partially *benami*.

But a question arises at the threshold whether a Court can entertain a contention of this description, which certainly would be, in my opinion, an extension of the law with regard to *benami* transactions.

Benami transactions, it may safely be assumed, are generally effected in order to conceal some fraud, or in order to support some object of a discreditable nature. But though the Courts have in the past recognised that the ostensible owner in a *benami* transaction can be ordered to restore the property to its original owner, I for my part would certainly not be willing to extend that doctrine and to hold that a transaction can be partly genuine and partly unreal, unless there are very strong reasons for obliging the Court to come to such a conclusion.

I should say, therefore, that in this case we should not allow the defendants to set up this particular contention that the transaction of 1857 was *benami* so far as the Modapa Thikan was concerned.

Undoubtedly the facts proved support the contention that there was some secret arrangement between these two families which were so closely connected. But I do not think that there is anything on the record to satisfy me beyond all doubt that there was an understand-

ing between the parties in 1857 which can be at the present day reduced into words.

The question, therefore, resolves itself into a matter of adverse possession. If the defendants could prove that they had been in possession of Modapa Thikan for more than twelve years before this suit was filed, then the plaintiffs, in spite of their title, would be barred from bringing their suit for possession.

The learned appellate Judge remarks that the question of possession is rendered somewhat complicated by the fact that different plots of the Thikan have been dealt with by different persons, and he had found that the plaintiffs' family mortgaged certain portions of the Thikan, although Kashi, who was the widow of Appa Savant, the cousin of Dhond and Vithal Savant, appears to have mortgaged a small corner of the Thikan in 1900 for Rs. 10. The mortgage evidenced by Exhibit 44, which was dated 7th February, 1855, executed by Dhond and Vithal Savant in favour of Raghoji, has been paid off, and I do not think that that mortgage requires any further consideration.

We have then the finding of the Judge from the evidence of the plaintiffs and their witnesses that the Ghogles had been in possession of the land in suit through their mortgagees or the persons who were managing the lands on their behalf, that there had been no adverse possession on the part of the Savants; and that the Ghogles were in possession within twelve years prior to the suit. In the face of those findings, which are findings of fact supported by the evidence, it would be difficult for us to come to a conclusion that the defendants had been in adverse possession of the suit property for more than twelve years before suit.

There is this further consideration that as the family was closely related, the mortgage by Kashi might have been for one family or the other, and the learned Judge said that Dhaku, the daughter of Appa Savant, the cousin of Dhond Savant, managed the property. She was assisted by her mother Kashi. Their possession was on behalf of Bala and his sons. It will be seen from the pedigree at page 2 of the print that Ramchandra, father of the plaintiff in Suit No. 325, married Dhaku, the daughter of Kashi.

Therefore, we cannot attach such importance to the mortgage of Kashi as might have been attached to it if the families had not been related. Considering the lapse of time since the properties were conveyed to the Ghogle family, and the uncertain nature of the evidence with regard to the dealings in respect of these properties, and the finding of the Judge that the Ghogle family had been in possession within twelve years of the suit properties, it is impossible, in my opinion, to come to a conclusion that the decrees of the lower appellate Court are wrong.

Therefore, Second Appeal No. 535 of 1916 must be dismissed with costs and Second Appeal No. 470 of 1916 dismissed.

Shah, J:—I agree.

Appeals dismissed.

A. I. R. 1922 Bombay 108.

PRATT AND FAWCETT, JJ.

Maruti Jyoti Shinde—Accused-Appellant

v.

Emperor—Respondent.

Criminal Appeal No. 151 of 1921, decided on 7th June, 1921, from an order of Asst. S. J., Satara.

(a) *Criminal P. C. (Act V. of 1898), S. 288—Statement as witness before committing magistrate—Retraction before Sessions Judge—Previous statement can be used as substantive evidence.*

In a trial before the Sessions Court two boys gave an entirely different version from what they gave before the Police in course of investigation and also before the committing magistrate as witnesses.

Held, under Section 288 of Criminal Procedure Court the statement made before the committing magistrate can be used if necessary as substantive evidence of the facts deposed to. [P. 109, C. 2.]

(b) *Evidence Act, S. 155—Depositions before committing magistrate can be used to contradict evidence in Sessions Court.*

Where in the Sessions Court witnesses retracted the statements made before the committing magistrate.

Held under Section 155, Evidence Act the statements made to the police and to the committing magistrate are relevant to contradict their evidence before the Sessions Court given in place of their retracted statements. [P. 109, C. 2.]

K. N. Koyaji—for Accused.

S. S. Patkar—for the Crown.

Judgment:—The two accused have been convicted of the offence under Section 436, Indian Penal Code, in that they destroyed by fire on the night of

14th May, 1920 the cattle-shed of the complainant in the village of Chikli.

It is admitted that the cattle-shed was burnt down that night. The next day the complainant's brother Dadu made a statement to the effect that the fire was accidental and Panchnama was recorded to that effect. The Panch and the Patil state that Dadu said that the two accused had burnt down the shed and that he was afraid to complain against them as they were the leaders of a gang who were the terror of the village.

The story given by the complainant and his brother Dadu is that these two accused endeavoured to extort from them a sale-deed of a field and on his refusal threatened that very night to burn down his cattle-shed. Shortly after that, the complainant was informed by the two Mahar boys, Joti and Shankar, that the cattle-shed had been burnt down in their presence by the two accused.

Now there is no doubt that the fire was not accidental. This is proved by the items of circumstantial evidence to which the Sessions Judge has referred. Firstly, the complainant and his brother did not invoke the assistance of any of the villagers to put out the fire. Secondly the fact that none of the cattle in the shed were injured corroborates the story of the two boys Joti and Shankar, that the two accused had come to them in the cattle-shed and set fire to it after directing them to untie the bullocks tethered there. Thirdly, the fact that the explanation of the fire given in the Panchnama cannot be true for there was no hemp on the upper floor of the cattle-shed.

Again there is no doubt that a state of terrorism existed in the village. The complainant and his brother left the village two days after the fire and did not return till sent for by the police some months later. Also an armed police post was stationed in the village to deal with this gang. These facts make it very probable that the explanation given of the statement of Dadu and the Panchnama of the 15th May are true.

Then there is the evidence of Narayan Dadu and Vithu, that accused attempted to extort the sale-deed from Narayan, and on his refusal threatened to burn down his shed. And there is the direct evidence of the two Mahar boys, Joti and Shankar, that it was the accused who set fire to the cattle-shed.

The statements made by Joti and Shankar are substantive evidence in the case. The Sessions Judge is wrong when he considers their previous statements made to the Police and the Committing Magistrate are relevant only to contradict or negative their statements made in the Court of Session. That is the effect of Section 155 of the Indian Evidence Act; but Section 288, Criminal Procedure Code, goes further and makes such statements "evidence in the case" *i. e.* substantive evidence of the facts therein deposed to. We agree on this point in the interpretation put upon the section in the cases of *Emperor* v. *Dwarka Kurmi* (1) and *Queen Empress* v. *Dorasami Ayyar* (2). In the latter case the judges said :—

"There can be no doubt the provision was intended to enable the Court to read the previous evidence as substantive evidence in the case at the trial where for the purposes of justice the adoption of such a course is found necessary by the Judge."

Before such evidence is substituted under Section 288, Criminal Procedure Code, it is necessary, as pointed out in *Queen Empress* v. *Jadub Das* (3) that there should be some reason why it should be preferred. That is a matter of prudence and not of law. Considering the state of terrorism which existed in the village and the probabilities of the case we feel sure that the statements of these two witnesses in the Magistrate's Court was the truth.

We accordingly confirm the conviction and sentence and dismiss the appeals.

Conviction and sentence confirmed.

(1) (1906) 28 All. 683=1906 A W.N. 187=3 A.L.J. 852.
(2) (1901) 24 Mad. 414=2 Weir 377.
(3) (1899) 27 Cal. 295=4 C.W.N. 129.

A. I. R. 1922 Bombay 109.

MACLEOD, C. J. AND SHAH, J.

Atma Ram Babaji Chowgale—Defendant-Appellant

v.

Narayan Arjun Dere—Plaintiff-Opponent.

Civil E. A. No. 17 of 1921, decided on 26th June, 1921, against the decree passed by Small Cause Court, Bombay in Suit No. 404 of 1920.

Civil Procedure Code (Act V of 1908) O. 1, R. 8—Caste—Management vested in

Managing Committee—President though authorised by resolution to file ejectment suits in his own name—Cannot do so except under O. 1, R. 8—Bombay Rent Act—Turning out tenant for putting in their own men as tenants is not a bona fide ***requirement.***

Where the president of a caste authorised under a resolution passed by the Managing Committee of the caste elected by the community under caste rules for the management of caste properties to file suits in ejectment in his own name, filed suits with the object to eject the existing tenants apparently for the purpose of letting out the premises to the members of the community.

Held, there being numerous members of the community, having the same interest in the suit, notice of the institution of the suit to all such persons as well as the permission of the Court is necessary for filing the suit as provided in Order 1, Rule 8 of the Civil Procedure Code. It cannot be said that the community, assuming the property belongs to them, required the premises in suit for their own purposes reasonably and *bona fide*, when the intention was to turn out the existing tenant and put in one of the community.

[P. 110, Cs 1, 2.]

K. N. Koyajee with *R. B. Paymaster*—for Applicant.

B. J. Desai with *J. G. Rele* and *S. A. Shete*—for Respondent.

Macleod, C. J.:—The plaintiff took proceedings under Chapter VII of the Presidency Small Cause Courts Act to eject the defendant from the premises in his occupation as a tenant. The plaintiff is the President of the Twashta Kasar Community, and the property of which the defendant was a tenant formed part of the endowment of a temple of the community called Shri Mahakali Saunsthan. It was contended that the plaintiff was entitled to sue alone because the Board of Management had authorised the President to give notice and file ejectment suits on behalf of the community. That would not entitle the plaintiff to sue in his own name.

There being numerous members of the community having the same interest in the suit, notice of the institution of the suit to all such persons as well as the permission of the Court was necessary for filing the suit as provided in Order 1, Rule 8, of the Civil Procedure Code. In our opinion the notice given by the plaintiff was defective.

But we notice there is a further objection to the decree for possession which was given to the plaintiff. The learned Judge said:

"The coppersmith shops near Pydhoni are the Saunsthan property. That is the centre of business in that particular trade. The Managing Committee have now resolved to give these shops to members of their community in preference to outsiders. And in these hard times I do not see why members of any particular community may not ask for full participation in the communal estate. The case is, however, slightly complicated by the fact that the applicant is himself a member of the Managing Committee and has voted in his favour. But this again is a sign of backwardness in education rather than *bona fides* in the Board of Management."

But the fact remains that it cannot be said that the community, assuming the property belongs to them, required the premises in suit for their own purposes reasonably and *bona fide*, when the intention was to turn out the existing tenant and put in one of the community, and the decision of the learned Judge cannot possibly be supported.

The Rule, therefore, will be made absolute and the suit will be dismissed with costs throughout.

Rule made absolute.

A. I. R. 1922 Bombay 110.

FAWCETT, J.

Ganeshi Eknath Kaulgi and another—Plaintiffs-Appellants

v.

Bhausaheb Bhawanrao Deshmukh—Defendant-Respondent.

F. A. No. 167 of 1921, decided on 2nd August, 1921, from an order of 1st Class Sub-Judge, Sholapur.

Bombay Hereditary Offices Act (III of 1874), S. 5—Mortgage by Vatandar ***void against heir of*** Vatandar—***Decree or other arrangement thereon is also void against them.***

After the death of the *Vatandar*-mortgagor, the decree-holder applied against the mortgagor's heirs to recover the full amount of the decree by attachment and sale of the property in the hands of the heirs of the mortgagor. The decree on the mortgagee against the *Vatandar*-mortgagor provided that the mortgage-debt was to be satisfied by payment of an annual sum out of the profits of the mortgage lands;

and in the case of deficit, the mortgagor was personally liable to make good the deficiency.

Held : any decree or any arrangement based on the mortgagee's rights under a mortgage, is also void against the heirs of the *Vatandar*, if the mortgage is in its inception void against the heirs of the *Vatandar*. [P. 111, C. 1.]

D. A. Tuljapurkar—for Appellants.

Fawcett, J. :—The Subordinate Judge has held that the application in effect asks him to vary the prescribed mode of satisfaction under the decree on the award and that as an executing Court he cannot do so. It seems to me that he is justified in that view; for the award decree clearly contemplates satisfaction by payment of an annual sum out of the profits of certain mortgaged lands, whereas the Court is now asked to recover the full amount due by attachment and sale of other property in the hands of the mortgagor or his legal representatives.

The appellant's pleader relies on the provision in the decree that, if the payment should fall short of Rs. 125 in any particular year, then the mortgagor should make good the amount from his other private resources. It is open to question whether that particular provision is a valid one, in view of the decisions in *Hargovindas* v. *Mohanbai* (1) and *Damodar* v. *Vyanku* (2) to the effect that no money-decree against a mortgagor can come into existence until the stage provided for by Section 90 of the Transfer of Property Act (now Order XXXIV, Rule 6, Civil Procedure Code) has been reached. That stage has certainly not been reached in the present case.

But even assuming that this particular provision could be authority for the application now under consideration, it seems to me that this will not avail the applicant. The real objection to the *Darkhast* is the fact that under the ruling in *Padapa* v. *Swamirao* (3), the mortgage was in its inception void against the heir of the *Vatandar*. That being so, any arrangement, or even any decree, based on the mortgagee's rights under such mortgage must also be void against the heir of the *Vatandar*. Such an arrangement or decree cannot be put on any higher footing than the transaction of mortgage on which it is based. No doubt it is possible that the applicant may have certain rights to recover what the opponent's father has failed to pay under the decree, *e.g.*, in consequence of the liability of a Hindu son to pay the debts of his father.

But that is an entirely distinct cause of action, and the Subordinate Judge has rightly held that any such claim can only be made in a properly framed suit. It is obviously not a case that can be dealt with under Section 47, Civil Procedure Code, for the claim will not be one relating to the execution, discharge or satisfaction, of the decree but will arise from a right different from applicant's rights under the decree.

The appeal is, therefore, summarily dismissed.

Appeal dismissed.

(1) (1900) 2 Bom L. R 225.
(2) (1906) 31 Bom. 214=9 Bom. L. R. 199.
(3) (1900) 24 Bom. 556=27 I. C. 86=7 Sar. 710 (P C.).

A. I. R. 1922 Bombay 111.

MACLEOD, C. J. AND SHAH, J.

Abaji Ragho Mhalas — Plaintiff-Appellant.

v.

Municipality of Jalgaon—Defendant-Respondent.

S. A. No. 756 of 1920, decided on 27th July, 1921, from a decision of Asst. J., Khandesh in A. No. 92 of 1919.

Bombay District Municipal Act (III of 1901), S. 122 --Obstruction in a public street- Municipality cannot—Removal of, after 30 years—Limitation Act, Art. 146-A.

The plaintiff who encroached upon a portion of a public street by building upon it, was called upon by the defendant Municipality to remove the obstruction, after 30 years under Section 122 of the Bombay District Municipal Act. In the suit by the plaintiff to restrain the Municipality from removing the obstruction,

Held . that the defendant Municipality could take no action under Section 122 of the Act after 30 years to remove the encroachment, it having been barred from filing a suit for the possession of the site encroached upon, the site was no longer a part of the public street but belonged to the plaintiff *Tayaballi* v. *Dohad Municipality* (22 Bom. L. R. 951 followed. [P. 112, C. 1.]

Pendse with *H. G. Kulkarni*—for Appellant.

P. V. Kane—for Respondent.

Macleod, C. J.:—The plaintiff sued for an injunction against the Municipality of Jalgaon not to remove the eastern two rows of steps leading to his house. The suit was dismissed in the trial Court, and an appeal against that decision was

dismissed on the 30th July, 1920. Since the appeal was dismissed the decision of this Court in *Tayaballi* v. *Dohad Municipality* (1) was reported. This case is on all fours with that case, and therefore, we must follow that decision unless we refer the matter to a Full Bench.

It was argued that that decision was in conflict with a prior decision of this Court in *Dakore Town Municipality* v. *Travedi Anupram* (2). But Mr. Justice Heaton was a party to both the decisions, and when the latter case was decided the prior case was before us, and I do not think that Mr. Justice Heaton could have concurred in my decision in the *Dohad Municipality case* (1), unless he was satisfied that the two cases could be differentiated.

However, there is no doubt that the facts of this case are very similar to the facts in the latter case, and we are bound by that decision. The basis of that decision is that after thirty years' adverse possession, an owner of a house who has encroached on the public street obtains a good title, therefore Section 122 which deals with encroachments on streets no longer applies.

It is argued to the contrary on the merits of the case, that Section 122 of the Bombay District Municipal Act gives the Municipality power to remove an encroachment which has been set up in any place after it has become a Municipal district, and to fine a person who has so encroached, and also to remove the encroachment, and that that power continues, however long the party who has encroached has been in possession of the site of the encroachment. That of course is a perfectly legitimate argument. It does not follow that the opposite argument is wrong, that, as the Municipality is barred from filing a suit for the possession of the site encroached upon after thirty years, the site after that period no longer forms part of the street, but belongs to the party who has been in adverse possession. The appeal, therefore, must be allowed and the plaintiff must be granted the injunction which he has asked for and the refund of Rs. 2 paid under protest with costs throughout.

Shah, J. :—I agree that this case is not distinguishable from the case of *Tayaballi* v. *Dohad Municipality* (1), and that on the authority of that case the plaintiff is entitled to a decree, which he prays for. I desire to add, however, that apart from that decision, I feel some difficulty in holding that the powers conferred upon the Municipality under Section 122 for the removal of encroachments upon public streets are subject to the rule of limitation to be deduced from the combined operation of Section 29 and Article 146-A of the Indian Limitation Act, as regards the acquisition of title by adverse possession.

It seems to me that there is a good deal to be said in favour of the view that under Section 54 of the District Municipal Act, it is obligatory on the Municipality to see that encroachments on public streets are removed and that the necessary powers are conferred upon the Municipality under Section 122 without any limitation in the interests of the public. At the same time it is clear that there is no express provision for a case of this kind where for thirty years the Municipality has taken no action, and the party encroaching on the public street claims to have acquired a title under the Indian Limitation Act by continuing the encroachment for a period exceeding thirty years.

In this conflict of considerations I am not prepared to dissent from the view taken in *Tayaballi's case* (1). The question no doubt is one of practical importance. To my mind there is an apparent conflict between the decision in *Tayaballi's case* (1) and the *ratio decidendi* in *Dakore Town Municipality* v. *Travedi Anupram* (2). But Mr. Justice Heaton who was a party to both the decisions, agreed in the later case that the earlier decision was distinguishable.

Under the circumstances I think that the decision in *Tayaballi's case* (1), should be followed. If that view is not in consonance with the true intention of the Legislature on this point, the Bombay District Municipal Act can be amended by the Legislature so as to give effect to its real intention.

Appeal allowed.

(1) (1920) 22 Bom. L. R. 951=58 I.C. 326.
(2) (1913) 38 Bom. 15=21 I. C. 313=15 Bom. L R. 833.

A. I. R. 1922 Bombay 113 (1).

MACLEOD, C. J. AND SHAH, J.

Uttaram Vithaldas—Plaintiff-Applicant

v.

Thakur Das Parshottumdas—Defendant-Opponent.

C. E. A. No. 35 of 1921, decided on 1st July, 1921, against the decision of 1st Class Sub-Judge, Surat.

Plaint—Plaintiff's servant signs and presents it—Vakilpatra *also signed by servant—Proof of authority wanting—Plaint is not properly presented—Civil P. C., S. 26.*

Where the plaint was signed and presented by a servant of the plaintiff, while the *Vakilpatra* was also signed by the servant.

Held: the plaint was not duly presented and not duly signed as the plaintiff made no effort to prove that his servant was his recognised agent trading on his behalf while he was away from the jurisdiction.

G. N. Thakor—for Applicant.

M. B. Dave—for Opponent.

Macleod, C. J.:—The plaintiff sued to recover the balance due in *Samvat* 1973 from the defendant and the price of goods supplied in *Samvat* 1973 and 1974, and for a further amount of Rs. 35 odd. The plaint was first presented on the 23rd October, 1920, signed by Vithaldas, a servant of the plaintiff, while the *Vakilpatra* of the Vakil was also signed by Vithaldas. When these facts came to the notice of the Judge on the 3rd December, 1920, he found that the plaint was not properly signed and not properly presented by the plaintiff, and that the pleader presenting the plaint was not duly authorised, and therefore, dismissed the suit with costs. We think he was right in holding that the plaint was not duly presented and not duly signed, as the plaintiff made no effort to prove that Vithaldas was his recognised agent trading on his behalf while he was away from the jurisdiction. But we think that if the plaintiff had applied to be allowed to sign the plaint and present it on that day, he should have been allowed to do so. Then of course the question of limitation would arise. We have nothing to do at present with that. So that to that extent the rule will be made absolute, the decree dismissing the suit will be set aside and the plaintiff will have an opportunity of having his suit considered as if it was filed on the 3rd December, 1920. The plaintiff must pay the costs up to date.

Rule made absolute.

A. I. R. 1922 Bombay 113 (2).

MACLEOD, C. J. AND SHAH, J.

Isoob Saiba—Decree-Holder

v.

Haidar Saiba—Opponent.

Civil Reference No. 4 of 1921, decided on 16th June, 1921, made by the Sub-J., Honavar.

Bombay Pleaders Act, (Act XVII of 1920), S. 10—Execution proceedings—Vakil appearing in suit—No separate vakalatnama is necessary.

Applications for execution of decrees are nothing but continued proceedings in suit and therefore under Section 10 (1) of the Act no separate vakalatnama is required. [P. 114, C. 1.]

V. R. Sirur—To support reference.

G. P. Murdeshwar—To oppose reference.

Reference:—The application for execution in this *Darkhast* has been presented by a pleader without *Vakalatnama* from the applicant. Up to this time no fresh *Vakalatnama* was required in the case of such applications if one had been filed in the suits out of which these applications arose. The practice was based on rule 2 (*g*) on page 187 of the Manual of High Court Circulars. This rule referred to Section 52, Regulation II of 1827 which contemplated that a pleader engaged in the suit was retained until the decree was satisfied. Though Section 52 of the Regulation was repealed by Section 42 of Act XVIII of 1879, this fact does not appear to have been noticed at the time of the making of Rule 2 (*g*) of the Manual. According to this rule no fresh fee was allowed to a pleader in the course of execution proceedings. The new Act relating to pleaders (No. XVII of 1920) allows separate fees in the applications for execution. Section 10 (3) specifically mentions cases in which no fresh *Vakalatnama* is necessary. Unless applications for execution are proceedings in suit a fresh *Vakalatnama* would be necessary in these cases. The explanation to Section 647 of Act XIV of 1882 laid down that applications for execution were proceedings in suits. The explanation does not find a place in the new Civil Procedure Code. It was thought unnecessary. Even in the old Code it was needed only for regu-

lating the procedure in certain proceedings. I think a fresh *Vakalatnama* is necessary in the present case.

But I am not certain that I am quite correct in this view. The question is of daily occurrence and it is greatly to the public convenience that it should be authoritatively settled.

"Whether applications for execution of decrees are proceedings in suits and do not require separate *Vakalatnamas* under Section 10 (1) of Act XVII of 1920."

Judgment:—This is a reference by the Subordinate Judge of Honavar asking this Court to decide the point whether applications for execution of decrees are proceedings in suits and do not require separate *Vakalatnamas* under Section 10 (1) of Act XVII of 1920. We think the question should be answered in the affirmative. We see nothing in the Bombay Act XVII of 1920 which would change the ordinary practice with regard to *Vakalatnamas*.

There is no necessity why an additional tax should be imposed upon litigants, and clearly the original *Vakalatnama* in the suit continues in force for the purpose of execution proceedings, although under the Act the Vakil is now entitled to a separate fee on account of those proceedings.

Answer accordingly.

A. I. R. 1922 Bombay 114.

SHAH AND CRUMP, JJ.

Ganesh Balakrishna Bhide—Defendant-Applicant

v.

Vithal Trimbak Bhide and others—Opponents.

Civil Application No. 582 of 1920, decided on 11th March, 1921.

Review—Extracts from records-of-rights not produced in the First Court—Plea abandoned in appeal—Non-production is no ground for review—Bombay Land Revenue Code, S. 135-H, sub-S. 2.

Where a certified copy of an extract from the record-of-rights relevant to the case was not produced at the trial as required under Section 135-H of Bombay Land Revenue Code and the point was abandoned in appeal.

Held the defect should be cured by allowing the plaintiff to put in the certified copies of the extract from the record-of-rights and that the previous non-production is no sufficient ground for reviewing the decision. The High Court has the power, as the Original Court has, to allow a reasonable time for the production of the extracts if it has not been produced and what is or is not is reasonable time is a matter entirely within the discretion of the High Court. Though the consequence of the omission on the part of the plaintiff to put in the necessary certified copy is as laid down in sub-Section 2 of Section 135-H, it cannot be said that the consequence must necessarily be given effect to at any stage of the litigation.

[P. 115, C. 1.]

A. G. Sathe—for Applicant.

P.B. Shingne—for Opponent No. 1.

Shah, J.:—This is an application for a review of our judgment delivered on the 9th January, 1920 in First Appeal No. 57 of 1918. The application is based on the ground that a certified copy of the relevant extract from the Record-of-Rights was not produced with the plaint in the case as required by Section 135-H of the Bombay Land Revenue Code, that therefore the plaint should have been rejected, and that all the subsequent proceedings taken in the absence of such certified copy must be treated as having been taken without jurisdiction. It may be mentioned that in the trial Courts apparently this omission was not noted until the arguments were heard. At that stage, time was allowed to the plaintiff to put in the necessary certified copy.

It is not clear as to what happened after that; but for one reason or another no copy was put in, and the trial Court proceeded to decide the case. In the memorandum of appeal here no point with reference to the omission to file the certified copy was taken; but at the hearing of the appeals in the course of the arguments it was mentioned, but ultimately abandoned. Though there is no record of it, apparently it was dropped as certain facts with regard to the production of the revenue records before the trial Court were pointed out by the pleader for the plaintiff. We did not refer to this point in the judgment probably because it was abandoned,

Whatever the reason for the point not having been pressed at the hearing of the appeal may be, and whether in fact it was abandoned or not, what we have now to consider is whether the review based on this ground should be allowed.

After a careful consideration of the provisions of Section 135-H of the Bombay Land Revenue Code and the history of the litigation, I am clearly of opinion that is not necessary in the interests of justice to grant this application, and that there is really no sufficient reason for reviewing our decision. Whatever the merits of the point may be, it could have been and should have been taken at the trial. It was not effectively taken at the trial or at the hearing of the appeal. Though I fully recognise that the consequence of the omission on the part of the plaintiff to put in the necessary certified copy is as laid down in sub-Section (2) of Section 135-H, I do not think that the consequence must necessarily be given effect to at any stage of the litigation. Having regard to the stage of the litigation which is now reached, I do not think that it is obligatory upon this Court to allow a review of the decree on the ground of non-compliance with the provisions of Section 135-H.

Even assuming that it is necessary to see that the omission is made good, when our attention is drawn to it, we can allow Mr. Shingne to cure the defect by letting him put in a certified copy of the extract. Mr. Shingne is ready to do so; and as the production of the certified copy is insisted upon by defendant No. 2, we allow the plaintiff to do so. I quite admit that if the omission is brought to the notice of the Court at the proper time, the plaint ought to be rejected unless the Court sees reason to give the plaintiff time to produce it. But I am unable to accept the contention now urged on behalf of the applicant that because this copy was not put in at the proper time, the necessary consequence of it must be that the plaint should be rejected and that the litigation should start afresh. That is a contention, which unless it is expressly or by necessary implication demanded by the provisions of the section, I am wholly unwilling to allow. The whole object of this section is to see that the trial shall not proceed in the absence of the necessary extract from the Record-of-Rights, so that the Courts may be in a position to know what the entry in the Record-of-Rights is and to see how far its correctness can be successfully impugned by the party concerned. But there is no reason to hold that the proceedings taken in the absence of this extract are null and void. The very fact that the omission was not minded by any party shows that in the circumstances of the case, the omission was more formal than substantial. Whatever the true view about the consequence of the non-compliance with the requirements of Section 135-H, sub-Section (1) may be, it is clear on the facts of this case, that there is no substance or merit whatever in the application, and that it is merely an attempt based on a technical ground to get rid of the result of the litigation, which has practically ended against the present applicant.

I would discharge the rule with costs.

Two sets of costs are allowed.

Crump, J.:—It is, I think, unfortunate that the present application for review is made by a pleader other than the pleader who argued the appeal; for we are left in some doubt as to what took place when the appeal was heard. My own impression is that the absence of the extract from the Record-of Rights was brought to our notice at the hearing and that the point for some reason which is now obscure was not pressed before us, and it was for this reason that there was no reference to it in our judgment. However, that may be, the absence of the extract in question would, I think, have been a ground apparent on the face of the record sufficient to support the application for review, were it not for the fact that the extract in question has now been produced. As I read Section 135-H, para. 2 of the Bombay Land Revenue Code, it appears to me that this Court has the power, which the original Court possessed, to allow a reasonable time for the production of the extract, if it has not been produced, and what is or is not a reasonable time is a matter entirely within our discretion. In the circumstances of the present case, having regard to the fact that the point has hitherto not been pressed, I am of opinion that the defect, if any, is cured by the production of the necessary extract at the present stage. For my own part, I am unable to distinguish the present case

from those cases where a certificate required by Section 4 of the Pensions Act (XXIII of 1871) has not been produced. The Legislature has laid down that no Civil Court shall entertain any suit, where such a certificate is necessary, without the production of that certificate. The language is not widely different from that used in the Bombay Land Revenue Code except that the Pensions Act is more general in its terms while the Bombay Land Revenue Code prescribes the result of the non-production of the certificate.

As regards the Pensions Act it has been held by this Court in *Antuji* v. *Vinayak* (1) that time may be given for the production of the requisite certificate even in Second Appeal. I see no reason why the same interpretation should not be placed upon the language used in Section 135-H, para. 2 of the Bombay Land Revenue Code. To allow timeis not inconsistent with the object of the Legislature in enacting this section, that is to say, the maintenance of the Record of-Right and its correction, where any correction becomes necessary by virtue of the decree of the Court.

Therefore in my opinion, the technical objection fails and the application should be dismissed with costs. Two separate sets of costs.

Rule discharged.

(1) (1914) 17 Bom. L.R 153=27 I. C. 927.

A. I. R. 1922 Bombay 116.

MACLEOD, C. J. AND SHAH, J.

Vali Asmal—Applicant

v.

A. U. Malji—Opponent.

C. E. A. No. 308 of 1920, decided on 6th June, 1921, against an order passed by Joint Second Class Sub-J., Broach in Civil Suit No. 240 of 1920.

Civil Procedure Code (Act V of 1908), O. XVI, R. 2—Pleader, summoned as witness—Subsistence allowance—Special fees cannot be allowed—Bombay High Court Civil Circulars, 1912, Cl. 55.

A pleader was merely called to give evidence as to what had occurred in a previous suit in which he was engaged as a pleader.

Held, that no special fees could be paid to ordinary witnesses, and if that has been the practice in the District Courts then it must be said that there is no warrant for it in law. There is no such rule either in the Civil Procedure Code or in the Civil Circulars applicable to this case; and in the absence of any such rule, the order of the lower Court, which is based apparently upon the practice of that Court, cannot be supported. [P. 117, C. 1.]

K. N. Koyajee—for Applicant.

G. N. Thakor—for Opponent.

Macleod, C. J. :—This is an application under the Civil Extraordinary Jurisdiction of this Court. The petitioner was the defendant No. 1 in suit No. 240 of 1919, on the file of the Court of the Joint Second Class Subordinate Judge at Broach. He had summoned Rao Bahadur Malji, a pleader, to give evidence with regard to a certain *purshis* which had been put in another suit, and had paid the usual subsistence allowance of Re. 1. In the end there was no necessity for the Rao Bahadur to give evidence as the parties to the suit admitted the mistake in the *purshis*. On the day on which Rao Bahadur had been summoned to appear he was actually appearing as a pleader in another suit in the same Court building, and had not, therefore, incurred any extra travelling expenses in going to the Court to give evidence. However, when the case was finished the Rao Bahadur put in a bill for Rs. 30 and this was allowed by the Subordinate Judge as the Rao Bahadur was called to depose on facts which he came to know in his professional capacity as a pleader.

Now the only jurisdiction, which the Court had, was to allow a certain payment to the Rao Bahadur on account of his being called as a witness for subsistence and travelling allowance under Clause 55 of the Civil Circulars. That clause provides for the travelling and other expenses which ought to be paid in the case of various witnesses according to various rates. Sub-Clause (*e*) states that peculiar cases are to be dealt with according to their own merits, and at the discretion of the Court from which subsistence money or travelling allowance is demanded. It is, therefore, open to a witness to show to the Court that none of the rates allowed in sub-Clause (*a*), (*b*), (*c*) and (*d*) apply to his case, but that there are peculiar circumstances which entitle him to demand subsistence money or travelling allowance at a higher rate. The learned Judge appeared to think that a special fee under sub-Clause (*e*) of Clause 55 of the Civil Circulars should be allowed, not because extra expenses had been incurred

by the witness, but because he was entitled to something more on account of his *status*. That was a wrong view to take, because the law does not provide for any special fee being paid to witnesses in the District Courts on account of their status It is different if a witness is called as an expert to give evidence in matters in which he is held to be an expert. This is not a case in which the Rao Bahadur was called to give evidence on a question of law as an expert. He was merely called to give evidence as to what had occurred in a previous suit in which he was engaged as a pleader. According to the statement made by the Rao Bahadur before the Subordinate Judge, it appears that other Courts had considered that such special fees could be paid to ordinary witnesses, and if that has been the practice in the District Courts, then I can only say that there is no warrant for it in law. If professional gentlemen consider that provision should be made by the law to compensate them for the loss of time when they are called to give evidence in Courts, then they should agitate for an amendment of the law. But the Courts have no jurisdiction to set up a practice by which litigants are directed to make payments to witnesses which the law does not authorise. The order allowing Rs. 30 to the Rao Bahadur must, therefore, be set aside.

It has been argued on his behalf that although the applicant has succeeded, no order as to costs should be made on the ground, first, that the respondent was not a party to the proceeding; secondly, that the demand made was only according to what he considered to be the recognised practice. But I could have understood the argument better if a preliminary point had been taken by the respondent that he was not a proper party to the rule, and that the Rule should have been taken out against the opposite party in the suit. Then the question of procedure would have been considered, and if the respondent is not a proper party, of course the Rule would have been discharged. But that is a preliminary point, and it was practically waived by the respondent when he entered upon his arguments of the Rule on the merits.

As a matter of fact, according to the record, the bill of costs was sent in to the Court by the Rao Bahadur and the decision of the Court, so far as I can see, was made between the Rao Bahadur, who was demanding the payment of the bill, and the present applicant. It is not the case of certain expenses of a witness being entered in a bill of costs to which an objection could be taken on a point of taxation. It is a demand made by a witness against the party who has issued the summons. I think, therefore, that the Rule was properly taken out against the respondent, and there was no reason why the ordinary law, that costs follow the event, should not be observed. If, as a matter of fact, the applicant has been wrongly ordered to pay this Rs. 30 then he is entitled to come to this Court for redress, and it would certainly be very unjust if in getting that order set aside it should cost him the same amount as the amount at stake on the application. In directing that the respondent should pay the costs of the Rule, we do not consider that any slur is involved on the Rao Bahadur since he seems to have considered himself entitled to make the demand quite *bona fide* according to a wrong practice which was in vogue in the District Court. But equally was the applicant entitled to come to this Court and get a final decision on this question. The rule, therefore, must be made absolute with costs.

Shah, J.:—I concur. The only question on this application is one of jurisdiction. That question is whether the Court had power to direct payment of Rs. 30 to the witness, who is the present opponent, and who was summoned in his professional capacity as a witness. It is clear that the case of a professional gentleman being summoned as witness is not covered by sub-Rule (2) of Rule 2 of Order XVI of the Civil Procedure Code The only basis of this order that is suggested by the Lower Court is Clause 55, sub-Clause (e) of the Civil Circulars of this Court. It is clear, however that Clause (e) has no application to the present case. Clause (b) specifically provides for the case of Vakils attending as witnesses; and in the absence of any indication of special circumstances justifying a higher payment for travelling expenses or subsistence money, Clause (e) cannot afford any basis for the order which has been made in the present case.

There may be some ground for the

argument that the time of the professional gentlemen would be taken up without a sufficient check upon the litigants if they could be summoned as witnesses without the summoning parties having to pay adequately for their attendance. But that is a matter for the Legislature or the Rule Committee under the Civil Procedure Code to consider. At present all that we are concerned with is whether there is any provision which can justify the order made by the Lower Court; and I am unable to find any such provision either in the Code or in the Civil Circulars.

Any argument based on the practice on the Original Side of this Court cannot avail the present opponent, as that practice is based upon an express rule of the High Court on the Original Side. There is no such rule either in the Civil Procedure Code or in the Civil Circulars applicable to this case; and in the absence of any such rule, the order of the Lower Court which is based apparently upon the practice of that Court cannot be supported. The order of the Lower Court must, therefore, be set aside on the ground that that Court had no jurisdiction to make it.

As regards costs, it has been urged on behalf of the opponent that it would not be right to make him pay the costs of this application. But there is no sufficient reason for departing from the ordinary rule that the successful party must get the costs which he had necessarily to incur in order to get the order set aside. I do not see how such an order as to costs could be interpreted as involving any reflection on the opponent who appears to me to have acted with propriety and in good faith in these proceedings.

Rule made absolute.

A. I. R. 1922 Bombay 118.

MACLEOD, C. J. AND SHAH, J.

Gulappa Rudrappa—Plaintiff-Appellant

v.

Erava Basangowda—Defendant-Respondent.

Second Appeal No. 776 of 1920, decided on 28th June, 1921, from a decision of Asst. J., Dharwar in A. No. 4 of 1919.

Limitation Act, Art 182, Cl. (5)—Application for making decree final accepted as being in time—Decision cannot be re-considered in later execution proceedings.

In 1904 a decree was passed in a mortgage suit. Within three years an application for order for sale of property was made, but was dismissed. Within three years of the latter application, similar application was made but was dismissed as no final decree was made as required by the new Civil Procedure Code. Within three years an application for final decree was made which was dismissed for non-payment of process fees. A similar application for final decree was made in time but was withdrawn.

Held that the applications for final decree were steps-in-aid of execution because they were accepted by the Court as being within time though really out of time; such acceptance gives a fresh start for limitation. [P. 119, C. 1.]

Per *Shah, J.*—An adjudication by Court that a certain application is in time cannot be re-considered when a question that it is out of time is raised at a latter stage of execution proceedings. [P. 119, C. 2.]

S. B. Jathar—for Appellant.

S. R. Parulekar for *A. G. Desai*—for Respondent No. 2.

Macleod, C. J.:—The plaintiff applied for execution of the decree in Suit No. 261 of 1903, which was passed on the 25th February, 1904 in a mortgage suit giving the usual six months' time for payment under Section 88 of the Transfer of Property Act. The present *Darkhast* was filed on the 7th September, 1915, and the decision now appealed from was dated 10th July, 1920. At that time the decision in *Desaiappa* v. *Dundappa* (1) had not been reported. There was, therefore, some excuse for the order dismissing the *Darkhast*.

The plaintiff sought for execution of his decree by a *Darkhast* filed on the 12th June, 1907. Notice was issued to the defendants. On their failure to appear, an order absolute for sale was made on the 2nd October, 1907, but as the plaintiff took no further steps in paying necessary fees, the *Darkhast* was eventually dismissed. Before the present Civil Procedure Code came into force, the proper procedure in the case of a decree under Section 88 of the Transfer of Property Act was to apply for execution, and not to apply for a final decree. But if time be taken to run against the decree-holder from the date of the decree and not from the end of the six months the period allowed for payment, then that *Darkhast* was presented more than three years after the decree. But no

(1) (1920) 44 Bom. 227=55 I C. 329=22 Bom L. R 76.

objection was taken by the Court, and an order was made on the *Darkhast* that the property should be sold.

Then on the 13th June, 1920, the plaintiff filed a *Darkhast* praying for the sale of the property but that *Darkhast* was dismissed on the ground that the New Code of Civil Procedure required that the preliminary decree in a mortgage-suit should be made final, and the plaintiff had not applied for a final decree. That clearly was a wrong decision. But the plaintiff was entitled to accept the order of the Court, and accordingly, on the 7th October, 1912, he applied for a final decree, but that application was dismissed for non-payment of process fees. He made a similar application on the 7th November, 1913, but withdrew from it before any notice of it was served on the defendants. Another *Darkhast* was filed on the 26th February, 1915, which was again dismissed for non-payment of process. Then this *Darkhast* was filed on the 7th September, 1915.

The only question which, so far as I can see, now arises is whether the *Darkhasts* of October, 1912, and November, 1913, in which the plaintiff applied for a final decree were steps-in-aid of execution. I fail entirely to see why the Court should not consider that these were steps-in-aid, for the plaintiff was endeavouring to get an order which he had been told to get when the previous *Darkhast* was dismissed. It is to my mind perfectly clear, and follows from the decision in *Desaiappa* v. *Dundappa* (1) that a *Darkhast* which is accepted by the Court, although it is out of time, starts a fresh period of limitation. The appeal, therefore, must be allowed and the *Darkhast* must proceed with costs throughout.

Shah, J:—I agree. I desire to add a word with reference to the argument urged by Mr. Parulekar that the order on the application of the 13th June, 1910, is final and binding on the parties. But the order from its very nature was operative only as regards that *Darkhast*, as the *Darkhast* was dismissed on the ground that an application for making the decree final was necessary. The point now is not whether it is necessary that the decree which was passed prior to the Code of 1908 requires to be made final or not, but whether the execution of that decree is time-barred. Even though that order may be taken to be final so far as it effected the *Darkhast* then under consideration, it has no effect so far as I can see upon the question whether the present *Darkhast* is time-barred or not. For the purpose of determining that question it is clear that all the previous applications have to be considered. They were steps-in-aid of execution. The *Darkhast* of 12th June, 1907, was held by the Court then to have been made in time and after that adjudication it is not open to the Court now to consider the question whether it was in time or not.

Appeal allowed.

A. I. R. 1922 Bombay 119.

MACLEOD, C. J. AND SHAH, J.

Gulabchand Chhotiram Marwadi and others—Plaintiffs-Appellants

v.

Ramnath Chhotiram Marwadi and others Defendants-Respondents.

F.A. No. 287 of 1920, decided on 27th July, 1921, from a decision of Sub. J., Dhulia in Suit No. 426 of 1918.

Partition—Claim that ought to have been but was not raised in partition proceedings—Separate suit does not lie—C.P C., S. 11.

A separate suit is not maintainable if the claim in respect of which the suit was filed is a matter which should have been dealt with in partition proceedings. Where a charge of negligence is brought by a party in a partition suit against a Manager, that is a matter which should be dealt with in the suit when accounts are being taken.

[P. 120, C. 2; P. 121, C. 1.]

P. B. Shingne—for Appellants.

B. G. Rao for *G. S. Rao*—for Respondents.

Macleod, C. J.:—In First Appeal No. 315 of 1916 we dealt with the decision of the lower Court in the Original Suit No. 42 of 1909 which was a partition suit. That suit had been proceeding for a very large number of years before a final decision could be arrived at; and the main question in that appeal was whether the lower Court was right in allowing the plaintiff's mesne profits of certain Nipani lands for the years 1905 to 1909, and we came to the conclusion that that order was wrong.

Now it appears that on the basis of certain remarks made in the judgment of

the trial Court dated 12th September, 1914, the plaintiffs filed this Suit No. 425 of 1918 claiming to recover Rs. 16,000 from the defendants as certain balances shown as due in the plaint Schedules A. B. C. These balances consist of certain amounts due on the bonds and certain amounts said to be outstanding as due against tenants for rents for the years 1905 to 1910.

Apart from anything that was said in that judgment, it would follow from what this Court said in the judgment in First Appeal 315 of 1916 that the plaintiffs were not entitled to any account of the mesne profits with regard to rents; and with regard to bonds which were divided amongst the members of the family, they had to take their chance whether the bonds were good or bad.

But certainly with regard to the question of any liability of the defendants with respect to these outstanding debts due on bonds it is a matter which fell to be decided in that suit, and not by a separate suit; and I do not think our attention was drawn, when that appeal was before us, to the fact that this present Suit No. 426 of 1918 was pending. In any event the plaintiffs have not followed the instructions of the learned Judge. He said: "The plaintiff had got the rent notes about all lands that have fallen to his share. He may sue the tenants and defendants on the rent notes in respect of which there are outstanding balances. In case defendants are found to be negligent he may sue them for negligence." In the first instance, the Judge said the plaintiff could sue the tenants making defendants parties and presumably seeking to make the defendants liable for their neglect in not recovering the rents.

Again the Judge said: "The plaintiff says that the first three bonds were not given to him but defendants say that they were given. The plaintiff may sue the defendants and the debtors." It is said that there is a suggestion there that the defendants would be liable on the bonds. The defendants might be necessary parties as being the persons to whom the bonds were given. But certainly the present suit as framed in which the plaintiff seeks to recover from the defendants the amounts of the bonds could not possibly be entertained.

But apart from that this is a claim within a partition suit with regard to matters which certainly should have been dealt with in the partition proceedings, as it was intended that the partition suit should once and for all have disposed of all questions with regard to the family estate; and it is certainly undesirable, after the decision, in the partition suit which had been going on for so many years, that one party should file subsidiary suits against the other party on matters which in the ordinary course would be relevant questions in the partition suit. I think, therefore, that the decision of the learned Judge in the Court below was right and that the appeal must be dismissed with costs.

I should like to mention that my own opinion is that if a charge of negligence is brought by a party in a partition suit against a manager, that is a matter which should be dealt with in the suit when accounts are being taken. There is no warrant for such a question being left outside, leaving it to the option of the aggrieved party to file another suit if he so chooses.

Shah, J.:—I entirely agree. The main part of the claim relates to the amount said to have been recovered by the defendants in respect of certain lands the rent notes whereof were assigned in the partition suit to the present plaintiffs' share. It is not disputed that the rent notes were assigned to the plaintiffs in pursuance of the preliminary decree. Though the preliminary decree is not before us, the learned pleader for the appellants has conceded that fact. The present claim is in respect of the rents said to have been realized by the defendants partly prior to the partition suit of 1909, and partly after the suit was filed. It is difficult to understand how a suit of that character could be maintained now.

The only ground upon which the right to file a separate suit is claimed for the plaintiffs is based upon certain remarks which were made by the trial Court when the final decree was passed. If those remarks are considered in relation to the context, it is clear that practically the plaintiffs' claim for mesne profits in respect of those lands for the years 1905 to 1910 was not then allowed by the trial Court. Even assuming at the best in favour of the plaintiffs that the trial

Court then thought that the plaintiffs might be able to recover them in a separate suit when the matter came up in appeal before this Court, this Court disallowed mesne profits for that period in respect of the Nipani lands. The present suit in respect of the rents for the years 1905 to 1910 is nothing but a claim for mesne profits partly prior to the date of the partition suit, and partly after the date of the suit. It is clear that it was really a point arising in the partition suit; and having regard to the result of the appeal to this Court there could be no doubt that that claim would have been disallowed, even if it had been allowed by the lower Court. It follows that the plaintiffs cannot now maintain a suit in respect of the mesne profits which would have been disallowed if they had been claimed then as mesne profits. I do not think, therefore, that the remark in the judgment, which was rather unfortunate, enables the plaintiffs to maintain the present action which otherwise is clearly unmaintainable.

As regards the bonds also, it is an admitted fact that they were assigned to the plaintiffs in pursuance of the terms of the preliminary decree; and the mere fact that the claims under those bonds are time-barred is no reason whatever for the plaintiffs to sue the defendants now separately as if they were responsible to them for negligence. If there was any allegation against the defendants in respect of the claim relating to these bonds, it could have been and should have been made in the partition suit. But unfortunately the trial Court while passing the final decree left it open to the plaintiffs to file a separate suit. It was quite open then to the plaintiffs to have objected to that course, as they did object to other items when they appealed to this Court. The judgment of this Court shows that all the objections that were raised were disallowed with respect of different items. There was nothing to prevent the plaintiffs from raising that point in the appeal to this Court. Apparently they did not do so at the hearing though I am not at all sure that the point was not covered by the memorandum of appeal; and now they sue the defendants alleging negligence on their part. There is nothing said beyond this that the defendants allowed the bonds to be time-barred. That is hardly sufficient to support the claim. It appears to me that the plaintiffs' suit in respect of these bonds was rightly dismissed. It is not suggested before us that when the bonds and the rent-notes were assigned to plaintiffs' share, any provision was made in the preliminary decree reserving to them the right to make the claim which they have now made.

Decree confirmed.

A. I. R. 1922 Bombay 121.

MACLEOD, C.J. AND SHAH, J.

Khanderao Dattatraya Wakde—Defendant-Appellant

v.

Balkrishna Mahaleo Phulambrikar and others—Plaintiffs-Respondents.

Cross Appeals Nos. 851 of 1920, and 1 of 1921, decided on 28th July, 1921, from a decision of District Judge, Poona, in A. No. 146 of 1920.

Partition Act (IV of 1893), S. 4—Benefit of section available only to—Transferee of a share suing for partition.

The object of Section 4 of the Act is to enable the members of a family in the case of one of their members having transferred his share to an outsider who seeks partition, to buy out that outsider by having his share valued. The right given to a sharer to buy out a transferee who is not a member of the family is limited to a transferee who sues for partition and cannot be extended to any defendant co-sharer who may claim his share in a partition suit. [P. 122, C. 1.]

K. H. Kelkar and *Y. N. Nadkarni*—for Appellant.

B. G. Rao—for Respondent.

Macleod, C. J.:—In this case a decree was passed in a partition suit instituted by one Phulambrikar asking for partition of his one-third share of a certain house in Poona. The house is owned by the following persons in equal shares, Phulambrikar who had bought one-third from Bhikaji a member of the original family of owners, Balvant the 2nd defendant a member of that family, and Khanderao the 3rd defendant who derives his title through Gangadhar, a member of the original family. After the partition decree was passed, applications were made by the 2nd defendant under Section 4 of the Partition Act, asking the execution Court to take action under that section with regard to the shares of the plaintiff and the 3rd defendant.

The lower Court granted the application and an appeal against that decision was dismissed. Undoubtedly the 2nd defendant is entitled to have a valuation made of the share of the plaintiff who is a transferee from a member of the original family. But the lower Courts have also granted the application of the 2nd defendant with regard to the share of the 3rd defendant. That could only be done if the 3rd defendant could be considered as a transferee from a member of the family suing for partition. He is a transferee from a member of the family but it certainly cannot be said that he is suing for partition.

The object of Section 4 of the Partition Act is to enable the members of a family in the case of one of their members having transferred his share to an outsider who seeks partition to buy out that outsider by having his share valued, and in ordinary cases such an application would be made before any preliminary decree was passed in the suit. That would then put an end to the suit unless one of the defendants wished to continue and apply to have his name inserted as plaintiff in the place of the plaintiff who had been bought out.

In this case the proceedings had gone so far that the Courts decided the question of partition, but the method of partition has not been decided. That, however, does not make any difference, as it is not suggested that the application of the 2nd defendant is too late. But it seems to me the result must be that if the plaintiff's share is valued under Section 4, and defendant No. 2 pays its value, then there is an end to the partition suit, as there is no longer any plaintiff to the suit, and unless one of the defendants applies to be made a plaintiff in his place, the proceedings must necessarily abate. However, that is a matter for consideration when the valuation of plaintiff's share has been made and the 2nd defendant has paid the amount of the valuation. At present this appeal must be allowed to this extent, that the share of the 3rd defendant cannot be dealt with under Section 4 of the Partition Act.

Second Appeal No. 851 of 1920, filed by Khanderao is successful, while the appeal filed by the plaintiffs fails, so that Second Appeal No. 851 of 1920, is allowed with costs against the 2nd defendant, and Second Appeal No. 1 of 1921 is dismissed with costs in favour of the 2nd defendant.

Shah, J.:—I agree. It is clear that defendant No. 2's application under Section 4 of the Partition Act could succeed only against the person who is a transferee from a member of an undivided family and who sues for partition. I do not desire to express any opinion as to what the effect of the application of defendant No. 2 being granted against the plaintiff under Section 4 would be upon the suit at the stage at which the right to buy out the plaintiff is asserted by the defendant No. 2. That question does not arise at present. But I feel quite clear that Section 4 is limited to the transferee who sues for partition. The right given to a sharer to buy out a transferee who is not a member of the family is limited to a transferee who sues for partition and cannot be extended to any defendant co-sharer who may claim his share in a partition suit.

Orders accordingly.

A. I. R. 1922 Bombay 122.

SHAH AND FAWCETT, JJ.

Nagindas Maneklal and others—Defendants-Appellants

v.

Mahomed Yusuf Mitchella—Plaintiff-Respondent.

S. A. No. 486 of 1919, decided on 20th July, 1921, from a decision of Asst. J., Surat, in A. No. 93 of 1918.

Hindu Law—Joint family—Contract by adult members to dispose of dilapidated house—Minors are bound—'Benefit' may sometimes mean 'necessity.'

The adult co-parceners of a joint Hindu family contracted to sell to the plaintiff a house belonging to the family which was not in good condition and which did not fetch any rent It was not necessary to sell the house as the family was in good circumstances. When the plaintiff sued for specific performance of the contract to sell, the minor co-parceners objected on the ground that there was no necessity for sale and that therefore the contract could not affect their interest.

Held. As the adult co-parceners very properly decided to dispose of the house which was in dilapidated condition and which the Municipal Committee wanted to pull down the minor co-par-

ceners were bound by the agreement. The term 'necessity' must not be strictly construed. The benefit of the family may under certain circumstances mean a necessity for the transaction.

[P. 123, C 2]

B. J. Desai and *K. N. Koyajee*—for Appellants.

Bahadurji and *G. N. Thakor* and *M. B. Dave*—for Respondent.

Shah, J.:—This appeal arises out of a suit for a specific performance by the plaintiff of a contract which was entered into with him by defendants Nos. 1 and 2 who were the adult members of a joint Hindu family. The immovable property which they contracted to sell was ancestral and the ground upon which the suit for specific performance was resisted was that defendants Nos. 1 and 2 at the date of the contract had minor sons who had vested interests in the property and that as the family was in a good condition it was not necessary to sell it. Both the lower Courts have allowed the plaintiff's claim.

It is contended that defendants Nos. 1 and 2 have no power according to Hindu law to alienate the ancestral estate so as to bind the interests of the minor members of the family without legal necessity; and it is further contended that no legal necessity is proved and that benefit to the minors is not sufficient to justify the sale. Several cases have been cited in the course of the argument on the question whether the Court could grant specific performance of the contract against defendants Nos. 1 and 2, who, it is said, were not competent according to Hindu law to convey the interests of their minor sons in the absence of legal necessity.

It is, however, essential first to look to the facts found in this case. The issue raised in the lower appellate Court was whether this contract was for the benefit of the family and binding on the minors. The finding of the lower appellate Court was against the defendants. It is found that "the defendants meant to sell the house in suit for the evident advantage or benefit of the whole family and therefore for the benefit or advantage of their minor sons also. If the house fell down completely and remained in that ruinous condition, it would not fetch the price the plaintiff has agreed to pay. It would fetch no rent as well. The sale for Rs. 1,975 would bring annually at least Rs. 100 by way of interest to the family. The transaction was thus clearly and evidently one of decided advantage to the family and to the minor sons of the defendants and did not at all savour of the nature of speculation." It is also found that the house was in a dilapidated condition and the defendants had received notice from the Municipality to pull it down. Under these circumstances two adult members of the joint family agreed to sell this house.

I do not desire to attempt to lay down any general rule as to what would constitute necessity and as to when a Hindu father or co-parcener may deal with the ancestral estate for the obvious benefit of the family so as to bind the minor members. Even taking it that such power to alienate can be exercised only when a clear case of necessity is made out, I think the terms that "necessity" must not be strictly construed. The benefit to the family may under certain circumstances mean a necessity for the transaction. In construing the expressions used by Vijnanesvara in the Mitakshara to explain the verse which he has quoted with approval on this point, regard must be had to the word 'Kudumbartha' used in that verse (see Mitakshara, Chapter 1, paragraphs 28 and 29; Stoke's Hindu Law Books, p. 370). The expressions used must be interpreted with due regard to the conditions of modern life. I am not at all sure that Vijnanesvara intended to curtail the scope of the word 'Kudumbartha' while explaining it. I do not see any reason why a restricted interpretation should be placed upon the word 'necessity' so as to exclude a case like the present in which defendants Nos. 1 and 2, on all the facts proved, properly and wisely decided to get rid of the property which was in such a state as to be a burden to the family.

I think that the facts of the case fairly satisfy the test. It was assumed in the argument on behalf of the appellants that the lower appellate Court decided the case on the ground that transaction was binding simply because it was for the benefit of the minors. I think that the finding goes much further. It is not therefore, necessary to consider whether the benefit to the minors would

by itself be sufficient to justify such an alienation though it is clear that, where the benefit to the minors is not made out, specific performance could not be granted. On the facts found, I am not prepared to hold that the lower Courts exercised their discretion wrongly or committed any error of law in decreeing specific performance of the contract. I am of opinion, therefore, that the decree of the lower appellate Court should be confirmed and the appeal dismissed with costs.

Fawcett, J. :—I quite agree. No doubt cases of legal necessity are ordinarily those where debts have to be paid or there is other financial pressure. But I do not think there is authority for holding that legal necessity is confined entirely to such cases. I may refer to the remarks of their Lordships of the Privy Council in *Hunoomanpersad Pandey* v. *Babooee Munraj Koonweree* (1). There they said:

"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

That was a case of mortgage, but the Privy Council have held that the same principle applies to the case of a sale: *Girdharee Lall* v. *Kantoo Lall* (2).

Decree confirmed.

(1) (1856) 6 Moo. I. A. 393=18 W. R 81 N= 2 Suther 29=1 Sar. 552.
(2) (1874) 14 Beng L. R., 187=1 I.A. 321= 22 W. R. 56=3 Sar. 380.

A. I R. 1922 Bombay 124.

MACLEOD, C. J. AND SHAH, J.

Abdulla Avjal Momin—Defendant-Appellant

v.

Ismail Mugal Foda and others—Plaintiffs-Respondents.

S. A. No. 46 of 1921, decided on 25th July, 1921, from a decision of Joint, J., Ahmedabad in A. No. 73 of 1919,

Transfer of Property Act, S. 54—Pre-emption under Muhammaden Law—Payment of price and delivery of possession—No registered sale-deed—Right of pre-emption arises—Muhammadan Law—Pre-emption.

A right of pre-emption arises under Muhammadan Law where there has been an oral agreement to sell land followed by payment of price and delivery of possession to the purchaser. Section 54 does not apply to a sale under Muhammadan Law and no registered sale-deed is required (16 All. 344) followed.

[P. 125, Cs. 1, 2.]

G. N. Thakur—for Appellant.

R. W. Desai and *M. H. Mehta*—for Respondents.

Macleod, C. J. :—The plaintiffs sued to have their right of pre-emption enforced as regards the plaint-house sold to the 1st defendant by the 2nd defendant on their paying the sale price to defendant No. 1. The only issue in the trial Court was, whether the plaintiffs had performed all the ceremonies required of *safildari*. That was found in the negative and the suit was dismissed.

In the first appeal the issues for decision were (1) whether the lower Court erred in holding that the two demands were not made in this case, and that the first demand was not expressly referred to at the time of making the second demand; (2) whether it erred in holding that plaintiff No. 2 must have known of the sale during the absence of plaintiffs Nos. 1 and 3 and that he was in the town of Dodhra then.

These are purely issues of fact and were both found in the affirmative, and the Court, reversing the decree of the trial Court directed that on the plaintiffs paying to defendant No. 1 Rs. 1,900 together with the costs of the suit, defendant No. 1 should pass a sale-deed with respect to the plaint-house, and that if he failed to do so, within a month after the service of a notice to him through the Court, the plaintiff should be at liberty to deposit the money in Court, and ask for the execution of the sale-deed by the Court. The appellate Judge said: "The undisputed facts of the case are that an oral sale accompanied by the delivery of possession and receipt of Rs. 1,900 as purchase-money was effected with regard to the plaint-house sometime before the 15th February, 1917, the date of the notices Exhibits 27 and 29, and that the sale was notified to the Municipality for the purpose of muta-

tion of names on the 26th February, 1917. The learned Judge finds that all the formalities required hy Mahomedan law in the case of a person purporting to exercise the right of pre emption had been observed.

Then, the question arises, and that is really the question on this second appeal whether, if the sale was valid according to Mahomedan law but no registered deed had been passed so as to comply with the provisions of the Transfer of Property Act, the plaintiffs would be entitled to exercise their right of pre-emption. That question was decided in the affirmative by a Full Bench of the Allahabad High Court in *Begam* v. *Muhammad Yakub* (1). Again in *Najmun-nissa* v. *Ajaib Ali Khan* (2) it was held that no right of pre-emption arises upon a sale which, according to Mahomedan law, is invalid, as for instance, by reason of uncertainty in the price or the time for the delivery of the thing sold; but if such sale becomes complete, as by the purchaser getting possession of the thing sold, then the ownership of the purchaser becomes complete and a right of pre-emption arises.

The only case which we have been referred to in which this principle has been doubted is the case of *Budhai Sardar* v. *Sonaullah Mridha* (3). In that case the agreement for sale had not been followed by delivery of possession, and, therefore, the remarks of the learned Judges were confined to the facts of that case. Mr. Justice Carnduff did say (page 949); "I confess that the weight of principle and logic seems to me to be on the side of the contention that the general law, which is paramount and has superseded the Mahomedan law, should govern the incidents of sale in applying the law of pre-emption." But Mr. Justice Richardson did not go so far as that and confined himself to cases in which possession had not been delivered. He further said (page 952): "There is no difficulty in applying the Mahomedan law where possession is delivered but if it is to be applied where possession is not delivered inconvenience may be caused by the rule, or supposed rule of that law, that a sale is constituted by offer and acceptance unconditionally expressed."

It seems to me, therefore, that there is no reason why we should differ from the decision of the Full Bench of the Allahabad High Court, that where there has been an oral agreement to sell followed by payment of the price and delivery of possession to the purchaser, the right of pre-emption arises. If the parties entitled to pre-empt were obliged to wait until a sale-deed had been executed and registered they might very easily be deprived of their rights. I think, therefore, that the decision of the Court below was correct. The appeal must be dismissed with costs on defendant No. 1 only.

Shah, J.:—I agree that this appeal should be dismissed with costs. On the facts found it is clear that in pursuance of the contract of sale there was a transfer of possession to the purchaser and payment of the purchase money, to the vendor. There is nothing in the case to show that the parties to the contract had any intention other than that of effecting the sale of this property. In view of these facts it seems to me that the right of pre-emption did arise in favour of the plaintiffs in spite of the fact that there was no registered sale deed executed as required, by Section 54 of the Transfer of Property Act.

The point raised by Mr. Thakur is that the rules of Mahomedan Law for completing a sale have really been superseded by the provisions of the Transfer of Property Act, and that in determining as to when the right of pre-emption arises according to the Mahomedan law, the question whether the sale has been completed or not must be answered with reference to the provisions of the Transfer of Property Act. There is really a difficulty in applying the rules of pre emption strictly with reference to the rules of Mahomedan law applicable to sales, or even strictly with reference to the provisions of the Transfer of Property Act; and the difficulty has been sufficiently reflected in the divergence of judicial opinions in the reported cases on this point as in *Janki* v. *Girjadat* (4), *Begam* v. *Muhammad Yakub* (1), *Jadu Lal Sahu* v. *Janki Koer* (5)

(1) (1904) 16 All. 344=1894 A.W.N. 101.
(2) (1900) 22 All. 343=1900 A.W.N. 102.
(3) (1914) 41 Cal. 943=19 C.L.J. 601=23 I.C. 385=18 C.W.N. 890.
(4) (1885) 7 All. 482=1885 A.W.N. 97.
(5) (1908) 35 Cal. 575.

Budhai Sardar v. *Sonaullah Mridha* (3) and *Sitaram Bhaurao* v. *Sayad Sirajul Khan* (6). Though the point has not been decided by this Court, it has expressed an opinion in *Sitaram Bhaurao* v. *Sayad Sirajul Khan* (5) that perhaps the true solution of the question lies in looking to the intention of the parties. That may or may not be a strictly logical position, but that is a solution of the two extreme views on this point.

Looking at the question from that point of view, I feel quite satisfied that the intention of defendant No. 2 was uudoubtedly to convey the property to defendant No. 1, and the intention of defendant No. 1 was undoubtedly to purchase the property, as is evidenced by the fact that the purchase-money was paid and there was a transfer of possession. There is nothing in their subsequent conduct to suggest that there was any change in their original intention at any later stage even up to this time In going so far as to hold that the right of pre-emption does not arise until the title is completed by means of a registered conveyance, there is a difficulty. It is easy to conceive a case in which both the vendor and vendee may agree to postpone indefinitely the execution of a registered conveyance, and may defeat in that way the right of a neighbour to pre-empt. There is a good deal to be said in favour of the view which Mahmood, J., accepts in *Janki* v. *Girjatat* (4) and which is concurred in by Banerji, J., in *Begam* v. *Muhammad Yakub* (1). But in the latter case Banerji, J., agreed to allow the claim for pre-emption on grounds, which, as I read the judgment, would apply to a case like the present.

After giving the best consideration to the question I think that where there has been a transfer of possession accompanied by the payment of the price and the intention to convey the property is clear as in this case, it cannot be said that the right of pre-emption according to the Mahomedan law has not arisen.

Decree confirmed.

(6) (1917) 41 Bom. 636=42 I.C. 32=19 Bom. L R. 549.

A I. R. 1922 Bombay 126.

MACLEOD, C. J., AND SHAH, J.

Jina Jijibhoy Baria—Defendant-Applicant

v.

Mathur Jijibhoy Baria—Plaintiff-Opponent.

Civil Extr Application No. 88 of 1921, decided on 1st July, 1921, from an order passed by Mamlatdar, Borsad.

Bombay Mamlatdars Courts Act (II of 1906), S 5, Expl,—Possessory suit against co-sharer —Joint possession cannot be given.

In a possessory suit against a co-sharer, the Mamlatdar has no jurisdiction to award joint possession under the Act. [P. 126, C. 1.]

G. N. Thakur—for Applicant.

H. V. Divatia—for Opponent.

Macleod, C. J.:—The plaintiff filed this suit in the Mamlatdar's Court averring that the defendant had dispossessed him of three acres and seven gunthas of land out of Survey No 51. The order of the Mamlatdar was that the plaintiff should be put in joint possession of the whole of Survey No. 51 w th the defendant. It has been contended that that order was without jurisdiction. We have been referred to the decisions of this Court in *Keso Dinkar* v. *Moro Sakharam* (1), and *Krishni* v. *Gopala* (2) which decided that the Mamlatdar had no jurisdiction to award joint possession in proceedings under the Act III of 1876. The Mamlatdar in making this order relied upon the case of *Bai Jamna* v. *Bai Jadav* (3). But the question decided there was one of an entirely different character. The only ground on which we could hold that the Mamlatdar had jurisdiction would be that jurisdiction had been granted by Bombay Act II of 1906.

The explanation to Section 5 is, as often happens, somewhat obscurely worded, and it may be read in two different ways, either as confirming the decisions of this Court to which we have just referred *Keso Dinkar* v. *Moro Sakharam* (1) and *Krishna* v. *Gopala* (2) or as altering the law ; and at first we thought that the explanation might be read as showing that in certain cases of joint ownership the action of one co owner against the other might amount to dispossession, and, therefore, it might be concluded that where the action amounted to dispossession the Mamlatdar could award

(1) (1883) P J , 120.
(2) (1890) P J. 316.
(3) (1879) 4 Bom. 168 (F.B.).

joint possession. But we think the proper way to read that explanation is that any action of one co-owner who has rights over the whole property, although it may interfere, with the joint ownership of his co-owner, does not amount to dispossession under the Act and that it was not intended that ouster by one co-owner of the other should amount to dispossession within the meaning of the Act so as to entitle the Mamlatdar to award joint possession. This seems to us to be clear from the provisions of Section 19 which prescribe very clearly the points to be decided by the Mamlatdar at the hearing, and the case of a plaintiff who is asking for joint possession against his co-owner is not dealt with either expressly or by implication. We think therefore, the law still stands as it did when *Krishna* v. *Gopala* (2) was decided and that the Mamlatdar had no jurisdiction in this case to decree joint possession. The rule must be made absolute and the decree set aside and the plaintiff's suit dismissed with costs in the Mamlatdar's Court and in this Court.

Rule made absolute.

A. I. R. 1922 Bombay 127.

MACLEOD, C. J. AND SHAH, J.

Kushaba Ramji Thoke and others—Defendants-Appellants

v.

Budhaji Sakharam Thorat and another—Plaintiffs Respondents.

Appeal No. 65 of 1920, decided on 9th August, 1921, from an order passed by First Class Sub-Judge, Nasik in A. No. 202 of 1918.

(a) *Civil P. C., S. 11—Decree for redemption of mortgage—Second suit for redemption is barred.*

A second suit for redemption does not lie. *Ramji* v. *Pandharinath* [1918] (21 Bom. L. R. 56) referred to. [P. 127, C. 2; P. 129, C. 2]

(b) *Civil P C, O. 34, Rr. 7 and 8—What a preliminary decree should provide.*

There is a certain amount of inconsistency between Rules 7 and 8 of Order 34, C.P.C. A preliminary decree in redemption suit, ought not to direct more than this, that if the plaintiff makes a default then the mortgagee should have a right to ask for a final decree either for foreclosure or sale as is provided for by Rule 8 of the Civil P.C. [P. 128, C. 1.]

D. C. Virkar—for Appellants.

P. B. Shingne—for Respondents.

Macleod, C. J.:—The plaintiffs are the successors-in-title to the equity of redemption, which once existed in one Abaji Haibatrao, through one Hazarimal Birdichand who had purchased the equity of redemption at a Court-auction. He had sued for redemption in Suit No. 1138 of 1895, and a decree for redemption was passed with this condition that if the mortgagor failed to pay the mortgage-money within the time provided by the decree he should be finally debarred from all rights to redeem. The mortgage was not redeemed and the execution of that decree is now barred by limitation.

The question in this suit, was whether a second suit for redemption would lie. The trial Court rejected the claim. But the lower appellate Court relying on the decision in *Ramji* v. *Pandharinath* (1) reversed the decree of the lower Court and remanded the suit for trial. That decision was justified at any rate by the headnote in the case referred to; which, I think, although it followed the question which was referred to the Full Bench, is worded somewhat too widely as the terms of the decree in that case were to this effect, that if the plaintiff failed to redeem the property within the decretal period, then the mortgagee should recover the amount by sale of the property. The lower appellate Court in passing the order of remand now under appeal did not consider the terms in which the decree was passed in Suit No. 1138 of 1895. In *Sita Ram* v. *Madho Lal* (2) which was the case upon which the Chief Justice and myself relied for the opinion we gave on the question propounded, the learned Judges expressed the opinion that, if the decree in the first suit provided in distinct terms that in case of default in payment the mortgagor would be debarred from redeeming the mortgaged property afterwards, a second suit would be clearly barred under the rule of *res judicata*.

The difficulty arises really from the fact that the decree in Suit No. 1138 of 1895, was passed under the Transfer of Property Act which did not provide for a decree absolute, so that it was not strictly accurate to apply the term "decree *nisi*" to a redemption decree under the Act. Only one decree was passed, it being left to the parties in execution to determine

(1) (1918) 43 Bom. 334=49 I. C. 894=21 Bom. L. R. 56.

(2) (1901) 24 All, 44=1901 A. W. N. 194 (F.B.)

what effect should be given to that decree. I think very probably my own opinion as expressed in my judgment in *Ramji* v. *Pandharinath* (1) was that a decree passed under the Transfer of Property Act in whatever form, was in effect a decree *nisi*, and would not of itself put an end to the mortgage while it remained unexecuted. But considering the dissenting judgment by my brother Shah in that case and the particular terms of the decree with which the Full Bench was then dealing, I am not prepared now to say that the decree in the form in which it was drawn up in this case comes within that decision. The result must be, therefore, that the appeal must be allowed and the decree of the trial Court restored with costs throughout.

I would like to take this opportunity of pointing out that there is a certain amount of inconsistency between Rules 7 and 8 of Order XXXIV, Rule 7 is identical with repealed Section 92 of the Transfer of Property Act and contains a provision that if the payment directed is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold. That is not consistent with the provisions of Rule 8, which is new, which provides for a final decree in a redemption suit, and directs what should happen, first, if the payment is made, in which case the Court passes a decree ordering the mortgagee to deliver up the documents, and if so required, re-transfer the mortgaged property ; secondly, where the payment directed is not made in which case it provides for the various forms of final decrees which may be passed on the application of the mortgagee.

Evidently, therefore, a preliminary decree ought not to direct more than this, that if the plaintiff makes a default, then the mortgagee should have a right to ask for a final decree either for foreclosure or sale as is provided for by Rule 8 and that is the form of preliminary decrees which I used to pass in redemption suits when sitting on the Original Side.

Shah, J. :—The facts in this case are few and simple. One Abaji mortgaged the property now in dispute in 1872 to Kushaba and others. The equity of redemption was purchased by Hajarimal at a Court sale in 1874 in execution of a decree against Abaji. Hajarimal sued for redemption in 1895, and obtained a decree against the mortgagees in 1897, directing that he should pay Rs. 8,000 to the mortgagees within six months and recover possession of the mortgaged property and that in case of default he would be debarred of all rights to redeem. Nothing further was done under the decree; and no further order was passed under Section 93 of the Transfer of Property Act. It remained unexecuted and the mortgagees remained in possession. Hajarimal sold his interest in the property to the present plaintiff in 1915. They filed the present suit in April 1917 on the same mortgage for redemption and accounts and claimed to have the benefit of the Dekkhan Agriculturists' Relief Act. The question is whether the suit is maintainable in view of the provisions of Sections 11 and 47 of the Code of Civil Procedure.

In considering this question, I accept the proposition that the decision of the majority of the Full Bench in *Ramji* v. *Pandharinath*(1) so far as it goes, is binding upon us. The decree in the first suit in that case provided that in default the defendant was to recover the amount by sale of the property. The question referred to the Full Bench was no doubt in a general form ; but the reply of the Full Bench was neither categorical nor unqualified. For instance in that case Scott, C.J. expressed the opinion at the end of his judgment that the second suit would not be maintainable in case the decree was passed under the Dekkhan Agriculturists' Relief Act. In that case, the decree in the first suit was passed under that Act.

The Division Bench which ultimately decided that case did not follow that opinion. I refer to this point only for the purpose of showing a limitation which the learned Chief Justice had in mind. The case was argued and considered with reference to the facts of the case ; and I feel a doubt as to whether the Chief Justice intended to go so far as to lay down that the second suit would be maintainable even if the decree provided that in case of default the mortgagor was to be debarred of all rights to redeem. It may be that logic and consistency require

that the answer should be the same whether the decree in the first suit is in the form as in the Full Bench case or as in the present case. But the case is an authority for what it decides and not necessarily for all that logically follows from it. It is also clear from other cases that some Judges, at any rate, have based their conclusions upon the terms of the decree. For instance in *Sita Ram* v. *Madho Lal* (2) which has been referred to with approval by the majority of the Full Bench in *Ramji* v. *Pandharinath* (1) Banerji and Aikman, JJ., distinctly observed in their judgments that if the decree had provided that in default of payment within the time fixed the right to redeem would be barred, the second suit would necessarily fail; and this view is acted upon by that High Court in *Lachman Singh* v. *Madsudan* (3). I refer to these views only for the purpose of pointing out that, while adopting the view that a second suit is maintainable when the decree is in one form, it is reasonably possible to take a different view when the decree is in a different form.

There is a practical difference between a decree directing a sale of the property in case of default and a decree directing that in a case of default the right to redeem would be barred. In the former case the mortgagee has to proceed by way of execution to get the property sold: and the consequence that arises is directly attributable to his omission to do anything under the decree. In the other case the mortgagor has to proceed in execution and the consequences are attributable to his inaction, if he fails to execute the decree. It is possible that such considerations may appeal to some minds as justifying a differential treatment of the two decrees.

For these reasons I feel that the point as to whether a second suit could be maintained when the decree such as we have in this case remains unexecuted for over three years and when no order under Section 93 of the Transfer of Property Act has been made, is not necessarily answered by the majority of the Full Bench in *Ramji* v. *Pandharinath* (1). My own opinion as to whether a second suit is maintainable is expressed in that case; and I have no desire to repeat what I have said there. I have approached the consideration of this case with a desire to see if I can accept the opinion of the majority in that case as settling the question now before us. But for the reasons above stated I am unable to go so far.

I may add that prior to the Transfer of Property Act the decrees used to be passed in this form on mortgages in this Presidency, and no second suit was allowed: see *Ladu Chimaji* v. *Babaji Khanduji* (4) and *Maloji* v. *Sagaji* (5).

Even after the Transfer of Property Act came to be applied to this Presidency decrees in redemption suits were passed in that form; and the view, that all further proceedings with reference to the decrees were to be taken in execution thereof, has received the sanction of the Privy Council. Any view that is now taken as to the right of the mortgagor to file a second suit when he has allowed the execution of the first decree for redemption to be time-barred, will have the effect of unsettling the titles acquired under several redemption decrees passed in that form from 1893 to 1908, in which the parties have allowed the execution to be time-barred without obtaining any order under Section 93 of the Transfer of Property Act.

In consequence of the transposition of the provisions of the Transfer of Property Act to the Code of Civil Procedure and of the change in the provisions requiring a final decree after the preliminary decree instead of an order after the decree under the Transfer of Property Act, similar questions with reference to the decrees passed under the Code of 1908 possibly may not arise.

As the decisions stand at present, so far as I am aware a second redemption suit, when the decree is passed under the Transfer of Property Act in the form such as we have in the present case, would not be allowed by the Madras and Allahabad High Courts and probably not by the Calcutta High Court. In the absence of any clearly binding authority to the contrary I am free to decide this appeal in accordance with my own view of the matter, which is that the second

(3) (1907) 29 All. 481=1907 A.W.N. 137=4 A. L. J. 447.

(4) (1883) 7 Bom 532.
(5) (1888) 13 Bom. 567.

suit is barred by Sections 11 and 47 of the Code of Civil Procedure.

I therefore concur in the order proposed by my Lord the Chief Justice.

Appeal allowed.

A. I. R. 1922 Bombay 130.

MACLEOD, C. J. AND SHAH, J.

Shivappa Parsa Savade—Defendant-Appellant v.

Ramachandra Narasinha Deshpande—Plaintiff-Respondent.

Appeal 8 of 1920, decided on 28th February, 1921, from an order passed by Asst. J., Belgaum, in Mis. Application No. 56 of 1915.

Civil Procedure Code (Act V of 1908), Order XLVII, R. 1—Review—Dismissal of appeal to High Court under O. XLI, R. 11—Application for review to lower Court does not lie.

When an appeal to the High Court stands dismissed under Order XLI, Rule 11 of Civil Procedure Code, 1908 no application for a review can be entertained or proceeded with in the lower Court. [P. 131, C. 1; P. 134, C. 1.]

There is no sufficient reason within the meaning of Order XLVII, Rule 1 (1). why a review of the order under Order XLI, Rule 11 should be granted. If a party elects to proceed with an appeal and gets decision against him, it is no ground for a review that if he had known the decision would go against him he would have taken a different course. *Bapu* v. *Vajir* (1896) 21 Bom. 548; referred to. 44 Cal. 1011; followed. [P. 131, C. 2]

G. S. Rao—for Appellant.

T. Strangman and *A. G. Desai*—for Respondent.

Macleod, C. J.:—This is an appeal from the decision of the Assistant Judge of Belgaum, who allowed an application for a review of the judgment of the District Judge in Appeal No. 1 of 1915 and directed that it should be reheard on its merits.

The plaintiffs filed the suit in 1913 for possession of the suit property and mesne profits. The trial Courts dismissed the suit on the 26th November, 1914. The decree was confirmed by the District Judge on the 9th August, 1915. Thereafter the plaintiffs applied for a review and notice was issued on the 27th September, 1915. On the 15th November, 1915, the plaintiffs filed a second appeal in the High Court which was dismissed under Order XLI, Rule 11, on the 11th February, 1916. An application for a review of the order of dismissal was entertained on the 16th June, 1916, and a rule was granted, apparently on the ground that the plaintiff's application for a review of the judgment appealed against was pending. The application in the High Court was unfortunately allowed to remain undisposed of, while the application in the District Court was proceeded with. A point was taken that as the Second Appeal had been dismissed the District Court could no longer entertain an application for a review of its own judgment. On the authority of *Bapu* v. *Vajir* (1) the District Judge held that the summary dismissal of an appeal left the decree of the lower Court untouched and therefore he had still jurisdiction to review that decree. He then directed that the question whether the plaintiffs had strictly proved the allegations upon which the prayer for review was based should be tried. On the 13th November, 1919, the Assistant Judge decided that the evidence which the plaintiffs sought to adduce was not only new but also important as having a very close and material bearing on the issues raised in the appeal, and that the appeal should be reheard on its merits.

The appellant appeals against both decisions of the lower Court. On the first question it appears to be most unfortunate that the rule for review issued by the High Court was not first disposed of. If the review had been allowed and the order made under Order XLI, Rule 11, set aside the first question dealt with by the District Judge would not have arisen, for it is clear that an application for review of a lower Court's judgment, if made before an appeal from the same decision is disposed of, can be proceeded with. It is equally clear that if the application for review in the District Court had been made after the dismissal of the second appeal, it would not have been entertained. If the argument of the District Judge were sound an application for review of the lower Court's judgment could always be entertained whether made before or after an order under Order XLI, Rule 11, because the substantive decree is the decree of the lower Court even after the dismissal of the appeal. The fact, that in *Babu* v. *Vajir* (1) the High Court decided that an application to amend a decree, an appeal from which had been summarily dismissed, should be made to the lower Court, does not appear to decide the point before us. The Judges may very well have

(1) (1897) 21 Bom. 548.

thought that an application to amend a decree under Section 206 of the Code of 1882 in the limited circumstances mentioned therein should be made to the Court which passed the decree, and not to the Court which summarily dismissed an appeal therefrom, and the *ratio decidendi* may have been that the decree of the lower Court continued to be the substantive decree, but that decision is not binding on us when having to determine an entirely different question, and it has been dissented from by the High Courts of Calcutta, Madras and Allahabad. There would be an end to all certainty in litigation if a case could be reopened in the lower Court after an appeal to the High Court had been disposed of. This was the view taken by the Calcutta High Court in *Pyari Mohan Kundu* v. *Kalu Khan* (2).

In my opinion, therefore, as long as the appeal to the High Court stood dismissed, whether under Order XLI, Rule 11, or after hearing, no application for a review could be entertained, or proceeded with in the lower Court. It is necessary therefore to deal with the rule granted by Batchelor, J. on the 16th of June, 1916. Neither in the application for review nor in the applicant's affidavit are any grounds stated on which the application could have been granted, but we may assume that it was mentioned to the learned Judge that an application for review was pending in the District Court. The plaintiffs of course should have asked the Court, when the Second Appeal came on for admission, either for leave to withdraw it or for postponement until the result of the review proceedings had become known: In *Nand Kishore* v. *Anwar Husain* (3) and *Raru Kutti* v. *Mamad* (4). The fact that they continued to press for the admission of the appeal, and incurred the risk of the appeal being dismissed, when they knew that they were asking the lower Court for a rehearing on fresh evidence, show that their legal advisers had no clear conception of the trouble which would arise from concurrent proceedings in two Courts. For, if my view is correct and the District Judge was incompetent to review his own decree as long as the Second Appeal stood dismissed then all the proceedings in review had been without jurisdiction, and if we set aside the order under Order XLI, Rule 11, the application for review would have to be considered afresh in the lower Court. But in my opinion, there is no sufficient reason within the meaning of Order XLVII, Rule 1 (1), why we should grant a review of the order under Order XLI, Rule 11. If a party elects to proceed with an appeal and gets a decision against him, it is no ground for a review that if he had known that the decision would go against him he would have taken a different course, No new facts had become known since the decision sought to be reviewed, and that is really what the legislature has ordained should be shown before a review can be granted. If the words for "any other sufficient reason" were read in their widest sense a review could always be granted on the same state of circumstances as existed at the time of hearing, and there would be an end to all finality of judicial proceedings.

I would therefore discharge the rule of the 16th June, 1916.

However as all the judgments of the lower Court are before us I should like to say that it does not appear that any case was made out for the review of the original judgment of the District Judge. The real question at issue was whether the defendants could take advantage of Section 83 of the Bombay Land Revenue Code. It was proved that they and their ancestors had been on the land since 1799 and there was no evidence with regard to the origin of their possession, which clearly went far enough back into antiquity to give rise to the presumption that their possession was co-extensive with the plaintiffs' title. Whether the plaintiffs were owners of the soil or only grantees of the land revenue, a point to which the learned Assistant Judge seems to have attached such great importance, is absolutely immaterial in determining the nature of defendant's possession, and considering that it appears from the judgment of the Court in first appeal that all parties took it as admitted that the defendant's family had been in possession since 1799 at least, there is nothing in the documents which the plaintiffs now seek to rely upon which could destroy the

(2) (1917) 44 Cal. 1011=41 I. C 497.
(3) (1909) 32 All. 71=4 I.C. 809=6 A.L.J. 979.
(4) (1895) 18 Mad. 480.

effect of that admission or prove the origin of the tenancy.

Therefore, however much I might be inclined to overlook any matters of defective procedure in order that the issues between the parties might be finally determined on the materials now alleged to be available it seems obvious that the evidence which the plaintiffs seek to produce would not result in a reversal of the decree dismissing the plaintiffs' suit.

The appeal, therefore, must be allowed and the rule for review of the decision of this Court dismissing the appeal under Order XLI, Rule 11, discharged. The plaintiffs must pay the defendants costs of all proceedings in all the Courts.

A question might have arisen if the order for re-hearing of the appeal in the District Court had been allowed to stand, whether the appellate Court should have admitted the additional evidence or sent the case back to the trial Court. The proper procedure is by no means clear. The evidence would not have been additional evidence which an appellate Court can take itself under Order XLI, Rule 27, nor would Rule 23 or Rule 25 apply, and it seems to me that the logical result of the appellate Court granting the review would be that the suit would have to go back to the trial Court for a fresh decision of the issue after recording the fresh evidence.

Shah, J.:—In this case the District Court decided the appeal on the 9th August, 1915, against the plaintiffs. The plaintiffs then filed an application for review in the District Court on the ground of discovery of new and important evidence on the 20th September and a rule was granted on the 27th September. On the 15th November the plaintiffs filed a Second Appeal in the Court. This appeal was summarily dismissed under Order XLI, Rule 11, on the 11th February, 1916. An application for a review of this order dismissing the second appeal was made and a rule was granted. That rule is still pending.

After obtaining this rule the plaintiffs proceeded with the review petition in the District Court. That Court held on the 22nd July, 1918, that it had jurisdiction to deal with the petition in spite of dismissal of the Second Appeal. The application was then transferred to the Assistant Judge, who heard it on the merits, made the rule absolute and directed a re-hearing of the appeal on the 13th November, 1919.

The defendants have appealed from this order. We have now heard the appeal from the order and the rule on the application for review in this Second Appeal.

In my opinion the result of the appeal must ultimately depend upon the view which we take of the plaintiff's application for the review of the dismissal of their second Appeal. I shall, therefore first deal with the review petition.

The petition does not clearly state the grounds for review and there is no affidavit as to the circumstances under which the appeal came to be dismissed. It is obvious, however, that the applicants seek to get rid of the dismissal of the appeal, which might stand in their way as regards the review proceedings in the District Court. There is no substantial difference between an appeal dismissed under Rule 11 of Order XLI and an appeal withdrawn in the result, except as regards its effect on the right of the appellants to apply for a review of the lower appellate Court's decree. By asking this Court to review its order of dismissal, the appellants do not ask us to adjudicate the merits of the appeal in any different sense but seek merely to get rid of a legal bar to their review application, which when it was made to the District Court was in order. For the purpose of the review here, it must be assumed, and in the present case the assumption would not be without justification in view of the conclusion reached by the lower appellate Court on the merits of the review petition, that the applicants may have reasonable grounds to apply for a review of the decree of the District Court. Under such circumstances this Court has usually not refrained from helping the applicant, as the judgment in *Narayan Sidoji* v. *Davudbhai Fatebhari* (5) would show. The discretion must be exercised with reference to the circumstances of each case as to whether it is requisite in the interests of justice to grant a review. Speaking for myself I should be disposed to allow the review asked for. But my Lord the Chief Justice is not prepared to grant the review: and in view of the irregular procedure adopted by the applicants and lapse of time, I am not prepared to dissent from that conclusion. The result,

(5) (1872) 9 Bom. H.C.R. 238.

therefore, is that the application for review must be rejected.

The appeal from order must necessarily be considered on the footing that the dismissal of the Second Appeal stands. It is clear that the appeal must be considered subject to the limitations contained in Rule 7 of Order XLVII. It is also clear that the order made by the lower appellate Court is not open to any of the objections mentioned in Rule 7 (1). The application was made in time, it is found to satisfy the requirements of Rule 4 and the order is made in accordance with the provisions of Rule 2. I do not think that it is open to us to go into the merits of the order beyond the scope of the objections stated in Rule 7.

It is urged, however, that the application for review became wholly incompetent when the High Court dismissed the Second Appeal, and that the subsequent proceedings are without jurisdiction.

It is clear on the admitted facts that the review petition was in order when it was presented to the District Court. Under Section 114 of the Code of Civil Procedure, the plaintiffs were entitled to apply for a review of the decree of the District Court as at the date of the application no appeal was preferred to this Court. It is also clear that the mere fact of their having preferred the Second Appeal did not create any bar in the way of their proceeding with the application. It has been held that the pendency of the appeal subsequently filed would not deprive the lower Court of its jurisdiction to hear the application: see *Narayan Purushotham* v. *Laxmi Bai* (6), *Chenna Reddi* v. *Pedaobi Reddi* (7) and *Pyari Mohan Kandu* v. *Kalu Khan* (2). It is also indisputable that if an application for review were made to the District Court after the appeal from the decree sought to be reviewed is preferred to the High Court and dismissed by that Court, the District Court will have no jurisdiction to entertain the application: see *Narayan Sidoji* v. *Davudbai Fateh Bai* (5) and *Ramappa* v. *Bharma* (8).

The question that arises in this appeal is whether an application properly filed becomes incompetent in virtue of the subsequent dismissal of the appeal under Rule 11 of Order XLI, by the High Court. There is no decision on this point. The opinion expressed in *Pyari Mohan Kandu* v. *Kalu Khan* (2) on this point was not necessary for the decision of the case.

That opinion, however, is entitled to weight. It seems to me rather anomalous that the Court which has jurisdiction to deal with a review application properly made to it, should cease to have jurisdiction to proceed with it because of an order in the appeal from that decree of the Court, which leaves the decree untouched, and which has not the effect of confirming or varying that decree. Observations in *Bapu* v. *Vajir* (1) as to the effect of summary dismissal of an appeal on the decree appealed from ought to have the same force in a case like the present. It is true that the application in *Bapu* v. *Vajir* (1) was one for an amendment of the decree and not for a review thereof. A review application is subject to certain statutory limitations which do not apply to an application for an amendment of the decree.

It is clear that after the appeal is summarily dismissed, it is difficult to predicate, as required by the provisions of the Code, that no appeal has been preferred from the decree sought to be reviewed. It is difficult to extend the concession in favour of the party seeking a review beyond the stage to which the decisions of the type of *Narayan Puru-*

(6) (1914) 38 Bom. 416=23 I. C. 513=16 Bom. L.R. 189.

(7) (1909) 32 Mad. 416=6 M. L. T. 135=2 I. C. 802=19 M.L.J. 388.

(8) (1906) 30 Bom. 625=8 Bom. L.R. 842.

shotham v. *Laxmibai* (6) have carried it. Though it may be somewhat anomalous, it seems to me that in virtue of the dismissal of the appeal under Rule 11 by this Court, the District Court ceased to have jurisdiction to proceed with the review petition, which was quite in order, when it was made.

Though it has not been suggested in argument, I have considered whether the pendency of the rule issued on the application to this Court for review, of the dismissal of the appeal could justify our holding that the appeal was pending during all that time. If the appeal can be legitimately treated as pending while the rule was pending in this Court, the position would be covered by the decisions to which I have referred. But I do not think that without straining language beyond all reasonable limit, the appeal which was dismissed can be held to be pending simply because the rule on the review petition was pending. In form and in substance the appeal was disposed of, when it was dismissed.

Without expressing any opinion on the merits of the application for review in the District Court, the appeal from order must be allowed. Accordingly I concur in the order proposed by the Chief Justice.

Appeal allowed.

A. I. R. 1922 Bombay 134.

MACLEOD, C. J. AND SHAH, J.

Narayan Moreshwar Welankar—Plaintiff-Appellant

v.

Waman Mahadeo Kulkarni—Defendant-Respondent.

S. A. No. 441 of 1920, decided on 2nd March, 1921, from a decision of Asst. J., Satara, in A. No. 378 of 1919.

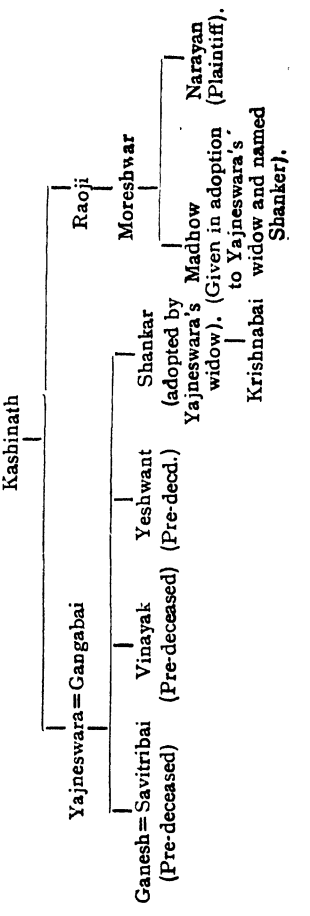
Hindu law—Inheritance—Widow inheriting as a gotraja sapinda ***to female—Widow takes absolute estate.***

In the Bombay Presidency under Hindu Law a widow inheriting as a *gotraja sapinda* from a female takes an absolute estate which would go on her death to her heirs and not revert to the heirs of the last female owner. 21 Bom. 192 (F.B.) followed. [P. 136, C. 2; P. 137, C. 1]

K. H. Kelkar—for Appellant.

P. V. Kane—for Respondent.

Shah, J.:—The facts which have given rise to this Second Appeal are not in dispute. The following table shows the relationship of the parties concerned:—



The property in suit belonged to Yajneshwara who died leaving a widow, Gangabhai, and a pre-deceased son's widow, Savitribai. After his death Gangabai adopted the natural brother of the present plaintiff from the other branch. It is common ground that after the death of Shankar and his widow in 1909, the property vested absolutely in Shankar's daughter, Krishnabai, who was a few months old then. She died few months after her parents. Savitribai took possession of the property as the next heir of Krishnabai, and sold it to the present defendant in 1913. Savitribai died in 1915; and the plaintiff, who is the grandson of the brother of Yajneswara, claims the property in the suit on the ground that

the alienation by Savitribai was not for any legal necessity and that it ceased to be operative on her death.

The defendant pleaded that Savitribai was absolutely entitled to the property as the heir of Krishnabai and that in any case the sale was for a legal necessity. Both the lower Courts have found that there were no legal necessity for the alienation, but they have held that Savitribai was absolutely entitled to the property and was competent to alienate it without any necessity.

In the appeal before us it is not disputed that Savitribai as the widow of the uncle of Krishnabai was a nearer heir to Krishnabai than the plaintiff according to the rule laid down in *Lallubhai Bapubhai* v. *Mankuvarbai* (1) and affirmed by the Privy Council in *Lalloboy Bhappoobhoy* v. *Cassibai* (2). She would undoubtedly be a nearer *gotraja sapinda* to Krishnabai's father than the plaintiff according to that rule, and, therefore, a preferential heir to Krishnabai. It is hardly necessary to discuss this point any further in view of the decisions in *Tukaram* v. *Narayan Ramachandra* (3) and *Basangavada* v. *Basangavada* (4) and the clear provisions as to the succession to the estate of a maiden, both in the Mitakshara and the Vyavahara Mayukha (see Mitakshara. Chapter II, Section XI, paragraph 11; Stoke's Hindu Law Books, p. 463 and Vyavahara Mayukha Mandlika's Hindu Law, pp. 97 and 98.)

It has been argued, however, that the widow inheriting as a *gotraja sapinda* according to the rule in *Lallubhai Bapubhai's case* (1) always takes a limited estate, and that on her death the property goes not to her heirs but to the heirs of the last owner, whether the inheritance be from a male or female. Where the widow inherits as the *gotraja sapinda* from a male, it is clear on the authorities that she takes the limited estate of a Hindu widow and that on her death the property would revert to the reversioners of the last male owner. But there is no direct authority on the question as to whether the widow inheriting from a female under similar circumstances takes it subject to the same limitation. The learned pleaders have not cited any such authority. We have taken time to consider the case and I have not been able to find any decision directly bearing on the point. In the case of *Bai Kesserbai* v. *Hunsraj Morarji* (5) the co-widow inherited the estate which was held to have been absolutely vested in the deceased widow. She was preferred as an heir to the estate as the nearest sapinda : but there was no question in that case as to the nature of the estate, which she took.

It is argued, however, on behalf of the respondent that the *ratio decidendi* in *Gandhi Maganlal* v. *Bai Jadab* (6) which found favour with the majority of the Full Bench is decisive of the question, and that the widow Savitribai took an absolute estate, which would go on to her death to her heirs and not revert to the heir of the last male owner. This was a decision as to the grandmother inheriting her maiden grand daughter's estate; and it was held that she took an absolute and not a limited estate. One of the grounds of the decision was that she did not take as the widow of her husband but as a grandmother.

It is urged on behalf of the appellant that the decision must be limited to the case of a grandmother, and that a widow who takes the estate as *gotraja sapinda* under the rule in *Lallubhai Bapubhai's case* (1) takes it as the widow of her husband and can only take it subject to the ordinary limitation of a Hindu widow. In the Full Bench decision, however, the majority of the Judges base their conclusion on the broad consideration that the general rule as to females inheriting the property in this Presidency is that they take it absolutely, and that the limited estate is an exception applicable to cases of females entering the family by marriage and inheriting from a male and not from a female. The exception, it is stated, does not apply when the inheritance is from a female. It is quite true that this reasoning was not accepted by Candy, J. But the other Judges (Jenkins, C J. and Ranade, Parsons and Crowe, JJ.) accepted that view ; and it appears to me that

(1) (1876) 2 Bom. 388.
(2) (1880) 5 Bom. 110=7 I. A. 212=4 Sar. 164 (P.C.).
(3) (1911) 36 Bom. 339=14 I.C. 438=14 Bom. L. R. 89.
(4) (1914) 39 Bom. 87=27 I. C. 167=16 Bom. L. R, 699.
(5) (1906) 30 Bom. 431=33 I.A 176=8 Bom. L.R. 446=10 C.W.N. 802=4 C. L. J. 9=3 A.L.J. 484=16 M. L. J. 446 (P.C.).
(6) (1899) 24 Bom. 192=1 Bom. L. R. 574 (F,B,).

their decision is based mainly upon that ground. Though they had not to deal in that case with a widow inheriting as a *gotraja sapinda* according to the rule in *Lallubhai* v. *Manukuvarbai* (1) the reason of the rule which they have enunciated is equally applicable to such a widow and cannot be confined to the case of a grand-mother inheriting from her maiden grand-daughter. I see no good ground to refuse to apply the general proposition enunciated in the case by the majority of the Full Bench to the case of a widow inheriting as a *gotraja sapinda* from a female.

In the present case it is clear that Krishnabai as the daughter of Shankar took the estate absolutely: and if on the death of Savitribai, who took as an heiress to Krishnabai the inheritance is to be traced back to the heirs of Krishnabai, we would be extending the theory of reverting to the last owner in the case of inheritance from a female in a manner in which it has never been done before in this Presidency. At least the reported decisions do not disclose any such application; and the observations of Telang, J. about the theory of reverting to the last male owner in *Manilal Rewadat* v *Bai Rewa* (7) suggest that the theory should not be extended beyond the limit already accepted in this Presidency. Personally I am unable to find anything in the Mitakshara or of the Vyavahara Mayuka, where the subject of *Stridhan* is dealt with to support the view that the estate inherited by a widow from a female is subject to such limitation as is applicable to a widow inheriting from a male.

It may appear rather anomalous that the widows coming in as *gotraja sapindas*, under a ruling which was based upon acceptance and usage rather than upon texts, should be able to take the property absolutely when they inherit from females, though they would take only a limited estate when they inherit from males. If, however, the significance of the absence of any such limitation in the texts relating to the devolution of *Stridhan*, technical or non-technical, such as is indicated in the texts in the case of a widow inheriting her husband's estates and as is now accepted in the case of all widows inheriting from a male in this Presidency is properly appreciated, it would appear that the anomaly is only apparent and not real. In the absence of any reported cases bearing on the question of the nature of the estate inherited by a widow taking under the rule in *Lallubhai Bapu Bai's case* (1) from a female who owns the estate absolutely, and in the absence of a clear indication of acceptance and usage to the contrary it is difficult to differentiate the case of such widows from the case of other females like the grand-mother inheriting from a female. I do not see any adequate ground not to apply to such widows the general rule as stated by Sir Lawrence Jenkins in *Ghandi Magan Lal's case* (6).

It is not without significance that, though the judgment of the learned Chief Justice in that case refers to the circumstance that the grandmother does not come in as a widow of her husband, it proceeds to deal with a point based on the difference between inheritance from males and females, and does not appear to lay any stress upon the first consideration as would appear from the fact that the case of a mother inheriting from a male is expressly included in the exception.

Further this Court has declined to reconsider the nature of the estate inherited by a mother from her son in spite of the judgment of Candy, J., and the reason given by the majority of the Full Bench that the grandmother did not come in as her husband's widow in *Gandhi Magan Lal's case* (6) see *Vrijbhukandas* v. *Bai Parvati* (8). The case of the grandmother inheriting from her grandson came up for consideration, when there was no such precedent as regards the nature of her estate as would necessitate the application of the rule of *stare decisis*. Still the point was treated as settled by the decisions relating to the mother and other widows inheriting from males: see *Dhondi* v. *Radhabai* (9). The decisions indicate by implication that the view of the majority of the Full Bench in *Gandhi Magan Lal's case* (6) as to the difference between inheritance from males and that from females was accepted as the real basis of the decision. After a careful consideration of the point I have come to the conclusion that Savitribai, inheriting as a *gotraja sapinda*

(7) (1892) 17 Bom. 758.

(8) (1907) 32 Bom. 26=9 Bom. L. R. 1187.
(9) (1912) 36 Bom. 546=16 I. C. 343=14 Bom. L. R. 569.

under the rule stated in *Lallubhai Bapubhai* v. *Mankuvarbhai* (1) from a female, took an absolute estate.

Though the case comes from a district where the Mitakshara law prevails, I have referred to the Mitakshara and the Vyavahara Mayukha generally as there is no conflict between the two on the point in question.

My remarks in this judgment are made strictly with reference to the law as accepted in this Presidency. It is obvious that the question cannot arise where the rule in *Lallubhai Bapubhai's* case (1) giving the widow the place of her deceased husband in the order of succession as a *gotraja sapinda* within certain limits is not accepted.

I would confirm the decree of the lower appellate Court with costs.

Macleod, C. J.:—I agree.

Decree confirmed.

A.I.R. 1922 Bombay 137.

MACLEOD, C. J. AND SHAH, J.

Dhulabhai Dabhai and others—Plaintiffs-Appellants

v.

Lala Dhula—Defendant-Respondent.

S. A. No. 158 of 1920, decided on 31st March, 1921, from a decision of D. J., Ahmedabad, in A. No. 384 of 1918.

Hindu law—Joint family—Sale of his share by a co-parcener—Suit for partition by the purchaser—Suit lies-share belonging to vendor to be given to him if possible.

If an outsider purchases a particular portion of joint family property from one of the co parceners in a joint family, he is entitled to a file a suit against the other members of the family for partition, and on partition, if possible, the property which he has purchased as belonging to a certain co-parcener should be given to him as his share. 11 Bom. H. C 72, and 11 Bom. H. C. 76 followed. [P. 137, C. 2.]

G. N. Thakor—for Appellants.

A. G. Dasai—for Respondent No. 1.

Judgment:—One Gema was the owner of certain property which he had mortgaged to one Babashai. Gema died leaving three sons Dabhai, Gokul and Hemta. Dabhai died leaving two sons Dhula and Desai. One Dhula Ram paid off the two mortgages created by Gema, and in consideration of this Gokul and Hemta sold to him a certain plot of land which in these proceedings is referred to as lot A. That was in 1908. Then in 1914 the sons of Dabhai filed a suit No. 239 of 1914 to recover by partition separate or joint possession of 1/3rd share in lot A. Subsequently Dhula Ram filed suit No. 386 of 1914 to recover his share of the whole of the family property by partition. It will not be necessary to refer to the course which the trial of these two suits took. But on the 4th August, 1919, the judgment was passed by the District Judge in two first appeals from the judgments of the lower Court in these two original suits. The result of that judgment was that suit No. 239 of 1914 was dismissed, and in suit No. 386 of 1914 partition was decreed, lot A which was estimated in value at 2/3rds of the family property being allotted to the plaintiff in that suit, the remainder of the property being given to Dhula and Desai Dabhai as their 1/3rd share.

It has been urged that Dhula Ram as the purchaser of lot A from two of the co-parceners had no right to file a suit for partition of the whole property. But that question was decided by two decisions of this Court in *Pandurang Anandrau* v. *Bhaskar Shadashiv* (1) and in *Udaram Sitaram* v. *Ranu Panduji* (2). It appears certain from those two decisions that if an outsider purchases a particular portion of joint family property from one of the co-parceners, he is entitled to file a suit against the other members of the family for partition, and, on partition, if possible, the property which he had purchased as belonging to a certain co-parcener should be given to him as his share. Therefore it is quite clear that Dhula Ram's suit was a perfectly good suit to partition the family property, while the suit of Dhula and Desai Dabhai to recover by partition from the heirs of Dhula Ram either separate or joint possession of 1/3rd share of lot A, was entirely misconceived. Really the only question which arises is whether the partition which was effected by the District Judge was a fair and equitable partition. He has valued lot A at 2/3rds of the whole of the family property and awarded it to the sons of Dhula Ram.

It was contended that there was a well in lot A, and that a well in joint family

(1) (1874) 11 Bom. H.C.R. 72.
(2) (1875) 11 Bom. H.C R. 76.

property was indivisible, therefore in some way the sons of Dabhai should be allowed a share in the well. But whatever the law may be, this question was never taken in the lower Courts. The only ground upon which the sons of Dabhai objected to the valuation and the method of partition was that the land in lot A was not properly valued at Rs. 992. The land of that lot was worth Rs. 2,000 as it was the best land and had a well in the field, and therefore in some way they should be given a share in the well.

The result then is, as very often happens, that a question of law is raised in Second Appeal, although the evidence upon which alone that question of law could be decided has not been led in the lower Court. We do not know the comparative situations of the various items of the family property, and it is not possible to say whether it would be of any use to give the plaintiffs, the sons of Dabhai, the rights of taking water from the well in lot A; nor can it be said that we have the materials to satisfy us that they should be given 1/3rd of lot A, as that would involve partition of each item of the joint family property amongst the claimants.

It seems to us really that they are seeking in Second Appeal to set aside the partition which has been made by the District Judge on a ground which cannot be sustained. The District Judge has partitioned the family property in the only way in which it could be partitioned. He has taken the value of each lot, and he has increased the value of the lot A, by Rs. 500, the value of the trees which Dhula Ram had sold, and finds the value of lot A to be Rs. 1,422, which is practically 2/3rds of the whole of the family property, and awards the rest of the property to the sons of Dabhai. That seems to be a perfectly fair decision. These appeals are dismissed with costs.

Appeals dismissed.

A. I. R. 1922 Bombay 138.

MACLEOD, C. J. AND SHAH, J.

Emperor—Appellant

v.

Motilal Hira Lal—Respondent.

Cr. Application for Revision No. 103 of 1921, dated 22nd June, 1921.

(a) *Criminal P. C. (Act V of 1898), Ss. 164 and 337—Accused—Tender of pardon can be made only during inquiry into an offence.*

Under the provisions of Section 337 of the Criminal Procedure Code a tender of pardon can be made only during an inquiry into an offence under the Code.

(b) *Penal Code (Act XLV of 1860), S. 193—Tender of pardon not legal—Statement of accused under such pardon cannot be basis of charge under S. 193.*

Where a pardon has been tendered, not during an inquiry under the Criminal Procedure Code, and the approver makes a statement under the pardon, such statement cannot form the basis of an alternative charge of an offence punishable under Section 193 of the Indian Penal Code, 1860.

[P. 143, C. 1; P. 144, C. 2.]

Bahadurji with *G. S. Palkar*—for the Crown.

Binning with *H. V. Divatia*—for Accused.

Macleod, C. J.:—The accused was convicted by the First Class Resident Magistrate of Nadiad of intentionally giving false evidence under Section 193 of the Indian Penal Code and sentenced to six months' rigorous imprisonment. An appeal to the Additional Sessions Judge was dismissed. The accused has now asked us to exercise our revisional jurisdiction in his favour.

The facts may be stated very shortly:

The accused was suspected of having been concerned with what is well known as the Nadiad Derailment Case. The offence was committed on the 12th April, 1919. On the 11th May, the accused was brought before Mr. Ker, the District Magistrate, who tendered him a pardon on the usual terms under Section 337 of the Criminal Procedure Code; he was then examined by the District Magistrate and stated how he along with others uprooted the rails just before the passing of the troop train. The accused was examined as a witness in the case before the Special Tribunal on the 25th and 26th July, 1920 when he swore that he had nothing whatever to do with the offence and that his statement before the District Magistrate had been induced by dishonest motives. Thereafter the requisite sanction was obtained from the High Court and the Special Tribunal, and after trial he was convicted as aforesaid on the ground that he had made two contradictory statements on oath, one of which he must have known to be false. Two main objections have been taken to the decisions of the lower Courts.

It is contended (1) that the pardon granted by the District Magistrate was illegal inasmuch as the Magistrate had no

jurisdiction to grant pardon under Section 337 of the Criminal Procedure Code, because the pardon must relate to an offence under inquiry that is to say, under a magisterial inquiry which has commenced under Chapter XVIII of the Criminal Procedure Code. That, as the grant of pardon was illegal, the accused's statement on oath before the District Magistrate was inadmissible in evidence and could not be made an alternative ground for giving false evidence.

(2) That the District Magistrate had no jurisdiction to examine the accused as a witness because under Section 337 the examination is to be made in the case, *i.e.*, at the time of the Magisterial inquiry or at the regular trial.

If these arguments are to be given effect to, it must follow that no pardon can be tendered under Section 337 until the commitment proceedings have commenced, nor can the evidence of a suspect be obtained in exchange for a pardon although it may often happen that without such evidence, it would be useless to institute proceedings against any one for the offence in question. It is difficult to believe that the Legislature ever intended to restrict the granting of pardons in such a way, but the question is whether Section 337 can be construed in the way in which it has been suggested by Mr. Binning that it should be construed.

Now "inquiry" is defined in Section 4 (k) of the Code as any inquiry other than a trial which may be conducted by a Magistrate under the Code. The term is not confined to proceedings in which an accused is placed before a Magistrate charged with an offence. Under Section 159 a Magistrate may make a preliminary inquiry in order to ascertain whether an offence has been committed and if so whether any person should be put upon their trial. No doubt in Section 164 it is provided that statements and confessions recorded thereunder should be recorded before the commencement of the inquiry or trial, and inquiry there refers to the commitment proceedings, while the Police proceedings in Chapter XVII are called "investigation." But it is difficult to see how it can be said that if a Magistrate is instituting an inquiry under Section 159 into an offence that offence is not under inquiry. However, it does not appear in this case that Mr. Ker was holding a preliminary inquiry under Section 159.

The Additional Sessions Judge has got over this difficulty by saying that Mr. Ker had to make an inquiry in order to ascertain if the accused was willing to accept a pardon on the usual terms. This is ingenious but hardly satisfies the rules of construction. Evidently from the record Mr. Ker thought that the term "under inquiry" in Section 337 was not used in a technical but in a popular sense since he considered that the offence was under inquiry from the 12th April, the date on which it was committed. Section 337 is the first section in a Chapter headed "General Provisions regarding inquiries and trials." It is certainly open to argument that "inquiries" could only mean enquiries held according to the terms of the Code, and that, therefore, an offence under inquiry could only mean an offence which was being inquired into by means of an inquiry instituted according to the provisions of the Code, and not an offence which was being inquired into in a popular sense, since it may always be said that as soon as an offence is committed and becomes known to the authorities inquiry naturally follows and it becomes an offence under inquiry.

The Code makes no mention of an inquiry by a Magistrate to ascertain whether a certain person is willing to accept the terms on which a pardon is offered to him. A Magistrate must no doubt ask certain questions, but questions are also asked before a confession is recorded and it does not follow that the offence then becomes an offence under inquiry. It does not appear, therefore, in this case that when the accused was tendered a pardon by Mr. Ker the offence was under inquiry, unless the words "under inquiry" can be used in their popular sense. A further difficulty arises in the construction of this remarkably ill-drawn section, because it is nowhere stated directly that the District Magistrate, when the pardon has been accepted, shall take down the statement on oath of the person who has accepted the pardon. Sub-Section (1) deals merely with the tender of a pardon : sub-Section (2) says that a person who has accepted a pardon shall be examined as a witness in the case.

Sub-Section (4) provides that a Magistrate who has tendered a pardon and has examined the person to whom it is granted shall not try the case if it is triable by a Magistrate. That might happen if the evidence of the approver showed that a minor offence had been committed and not an offence triable exclusively by a High Court or a Court of Session. A perfectly plausible construction of the section is that the District Magistrate may tender a pardon although he is not the Magistrate inquiring into the case provided an inquiry under the Code is proceeding. He could then take down the statement of the approver under Section 164 if an inquiry was proceeding under Section 159, but if the inquiry was proceeding under Chapter XVIII, the approver would have to be sent to be examined as a witness by the Magistrate holding the inquiry.

In this case it is not suggested that an inquiry was proceeding under Section 159, so the offence was not under inquiry and a pardon could not be tendered.

The other construction would be that as soon as the authorities are informed about an offence having been committed the offence becomes an offence under inquiry and the District Magistrate has jurisdiction to tender a pardon.

But assuming that the District Magistrate has power to tender a pardon if the offence is under inquiry in the popular sense, it is difficult to see how it can be said that if he examines on oath the person who has accepted the pardon, he does so under the provisions of Section 164 which enable a Magistrate to record the statements of witnesses or the confessions of accused persons before the commencement of the inquiry or trial. No doubt it would be desirable, if an accused person sent to a Magistrate for his confession to be recorded, says that he will not confess but if he is tendered a pardon he will make a statement, that the Magistrate should have power to tender a pardon and take the statement on oath, but, as far as I can see, this power has not been given by the provisions of the Code.

A similar question arose in the Court of the Judicial Commissioner of Sind in the case of the *Crown* v. *Andal* (1). The opponent, under suspicion of having committed a murder with two other persons, was placed by the investigating Police before the District Magistrate who tendered him a pardon which was accepted. He was then examined under Section 164, Criminal Procedure Code. He made a statement implicating himself and the other two persons who were then placed before the Sub-Divisional Magistrate on a charge of murder. The opponent was examined before the Committing Magistrate and denied nearly every statement of fact that he had made to the District Magistrate. An application was then made to sanction his prosecution for giving false evidence. It was suggested that the pardon was illegally tendered by the District Magistrate as the inquiry under Chapter XVIII of the Code had not commenced. Pratt, J. C., after referring to the Prinsep's Commentary on the Criminal Procedure Code which supported the suggestion, said (p. 175):—

"He (the author) appears to limit the scope of the section to a procedure by which a person, over whom the Magistrate is exercising jurisdiction as an accused person and who is therefore incapacitated by Section 342 (4) from giving evidence, can be converted into a witness. There is no authority for so limiting the section and I do not think of words of the section justify the limitation. The section refers to the 'offence under inquiry' but the word inquiry is not necessarily limited to an inquiry under Chapter XVIII, see the definition of the word in Section 4 (k) of the Code and its use in Section 159 where a Magistrate may make an inquiry for the purpose of assisting the Police in the discovery and arrest of the offender."

It is quite true that the District Magistrate need not be the Magistrate inquiring into the offence, but if the word 'inquiry' in the term 'offence under inquiry' is to be construed as defined in Section 4, then no doubt it must be shown that some inquiry under the provisions of the Code was proceeding before the District Magistrate could tender a pardon. Therefore, with all due respect, there seems to be a fallacy in the argument of the learned Judicial Commissioner as he considered the offence was under inquiry though it was not shown that any inquiry under the Code was proceeding. It would have been

(1) (1911) 5 Sindh. L. R. 174=13 I. C. 273.

different if he had considered that the word inquiry was used in its popular sense.

If, then, there are two possible constructions of Seciton 337 the accused is entitled to the benefit of that construction which is in his favour. I cannot but regret the conclusion to which I have been forced to come. The only remedy in my opinion, is for the Legislature at the earliest opportunity to recast Section 337 so as to make it clear (1) that the term "offence under inquiry" includes an offence under investigation, (2) that a District Magistrate or Presidency Magistrate, when the pardon has been accepted, can take the approver's statement on oath so that it can be the basis of an alternative charge of perjury if he contradicts himself when giving evidence in the case.

The rule must be made absolute.

Shah, J.:—The accused in this case has been convicted under Section 193, Indian Penal Code, in respect of two contradictory statements made by him. The first statement was made by him on the 11th May, 1919, before the District Magistrate of Kaira, when a pardon was tendered to him under Section 337, Criminal Procedure Code, in respect of the offence connected with the derailment near Nadiad in April 1919 punishable under Section 126 (b) of the Indian Railways Act (IX of 1890). The second statement was made by him in July 1919 when he was examined as a witness in the Nadiad Derailment case which case was tried by the Commissioners appointed under the Defence of India Act, IV of 1915. It is not disputed now, and it is obvious, that these two statements are contradictory, and that one or the other must be false to the knowledge of the accused. The prosecution do not seek to prove that the statement made by the accused as a witness at the trial is false, but rely upon alternative charge based upon the two contradictory statements. If, therefore, it can be shown by the accused that the first statement by him before the District Magistrate cannot form the basis of an alternative charge, the prosecution must fail.

It is urged on his behalf that the first statement cannot be made the basis of an alternative charge, firstly, because the District Magistrate had no power to tender him a pardon at that stage and to examine him on oath under Section 337, and, secondly, because the statement recorded by him is not provided for by the Code of Criminal Procedure, and cannot be used against him, quite apart from the question of the power of the District Magistrate to tender a pardon at that stage.

The undisputed facts relevant to these contentions may be briefly stated. The crime of derailment was committed on or about the 11th April, 1919, and it was under investigation on the 11th May. The accused was taken to the District Magistrate for a pardon. The District Magistrate first tendered the pardon to the accused, and then recorded his statement in question on oath. There was no inquiry then going on at the time under Chapter XVIII, and as the accused in the derailment case were tried under the Defence of India Act, no such inquiry was ever made. A report of the crime was made to the City Magistrate of Nadiad, under Section 157, Criminal Procedure Code, and it is not suggested that he had started any inquiry under Section 159 at the time. The District Magistrate in fact never acted under Section 159. In his evidence he states as follows:—"Beyond making these approvers and taking their statements I have done nothing in this case." It is also clear from his evidence that the statement in question was recorded under Section 337, Criminal Procedure Code.

As regards the first contention it seems to me on a proper construction of Section 337 that the District Magistrate had no power to tender the pardon under that section at that stage as the offence was not then under "inquiry" but under "investigation." In the case of offences triable exclusively by a Court of Session or High Court "inquiry" under the Code ordinarily means the inquiry under Chapter XVIII of the Code by the Committing Magistrate. The expression "any Magistrate of the First Class inquiring into the offence" used in Section 337 '1', in my opinion, ordinarily indicates a Magistrate holding an inquiry under Chapter XVIII. That, at any rate, is the only inquiry which is necessary under the Code in the case of offences exclusively triable by a Court of Session. The scheme of the Code and also the general provisions in Chapter

XXIV relating to inquiries and trials go to show that the word "inquiry" is used to indicate a judicial proceeding as distinguished from "investigation" and "trial." The word "inquiry" is used in various sections of the Chapter, for instance, in Sections 341, 342, 346, 347, 350, 351 and 352. In all these sections, having regard to the context, there could be no doubt that "inquiry" means the judicial proceeding contemplated by Chapter XVIII or any judicial inquiry provided by the Code: but it does not indicate any inquiry under Chapter XIV relating to investigation. It is difficult to believe that in Section 337 the word is used to indicate any other proceeding. If the word was used in the popular sense to indicate generally any offence exclusively triable by a Court of Session under investigation, the Legislature could easily have used an appropriate expression to indicate its meaning in that sense.

The learned Advocate General has contended that the word "inquiry" is used not in the same sense defined by the Code but in a popular sense; but I am unable to accept that contention. If that was the meaning, Section 338 would be unnecessary, as it could have been incorporated as part of Section 337, for the stage after commitment would also be included in the scope of the word "inquiry." But the Legislature has made a definite provision for tendering a pardon at any stage after the commitment indicating thereby that that stage is not meant by the word "inquiry" used in Section 337. I do not see any reason to assume that in such a general provision the Legislature must necessarily indicate all stages prior to commitment. It may well be that the Legislature only meant to provide for a tender of pardon after the case was before the Committing Magistrate for "inquiry" under Chapter XVIII.

It is further urged that the word inquiry as defined in Section 4 (k) includes every inquiry other than a trial conducted under this Code by a Magistrate or Court, and that it would include the inquiry made by the District Magistrate for the purpose of granting a pardon to the accused. Section 159 is relied upon by the prosecution for the purpose of showing that there may be an inquiry by a Magistrate before the inquiry, under Chapter XVIII before the Committing Magistrate, has commenced. I shall first deal with the argument based on Section 159. That Section does not help the prosecution in this case. No doubt an inquiry conducted by a Magistrate under that section would be an inquiry conducted under the Code and would be included within the meaning of "inquiry" as defined in the Code. But I feel some difficulty in holding that such inquiry is included within the meaning of the word as used in Section 337, for the inquiry, referred to in Section 337, with reference to an offence exclusively triable by a Court of Session, would be, I think, such an inquiry as is necessary under the Code, while the preliminary inquiry contemplated by Section 159 is by no means a necessary step in the proceedings connected with every such offence. It is difficult to hold that in such a general provision a stage of the proceeding is indicated by the word "inquiry" which is not by any means an essential stage in the proceedings connected with an offence exclusively triable by a Court of Session. At the same time, as a matter of construction, it is difficult to hold that an inquiry held by the Magistrate under Section 159 is not an inquiry conducted under the Code.

I do not desire to decide this point as it is not necessary to do so. Assuming that a preliminary inquiry under Section 159, Criminal Procedure Code, is included within the scope of the word "inquiry" used in Section 337 (1) it is clear that in the present case no such inquiry was going on at the time when the pardon was tendered to the accused. The report under Section 157, Criminal Procedure Code, was made to a Magistrate other than the District Magistrate, and it is common ground that that Magistrate was not making any inquiry under Section 159 at the time. It is not disputed that the District Magistrate made no inquiry under Section 159; and indeed it is not clear under the circumstances whether he could have held any inquiry under that section, even if he was minded to do so.

As regards the argument that the inquiry which the District Magistrate made under Section 337 was itself an inquiry under the Code within the meaning of the definition of that word, it is enough

to point out that the Code itself does not make any provision for any inquiry in the District Magistrate or any other Magistrate in connection with a tender of pardon. He may make such formal or informal inquiry as he likes for his guidance. But it is entirely a matter of his choice. Any such inquiry as he makes would not be an inquiry conducted under the Code within the meaning of Section 4 (k). No doubt the law requires him to state his reasons for tendering a pardon. But no inquiry is provided by the Code: and I feel no hesitation in holding that the proceeding which the District Magistrate made for recording his reasons for tendering the pardon was not an inquiry within the meaning of Section 4 (k). It would follow that the tender of pardon on the 11th of May, was not within the scope of Section 337 (1) and that the accused could not have been examined on oath by him at the time. The statement, therefore, cannot from the basis of an alternative charge.

Ordinarily it may not be a matter of any practical moment whether the pardon is tendered before or after the inquiry is started, as the person to whom the pardon is tendered would be examined as a witness at the inquiry before the Committing Magistrate and afterwards at the trial, when the pardon would be in force. But it becomes a matter of importance when the District Magistrate, not conducting any inquiry under the Code, examines a person on oath before the committal proceedings are started, and when that statement is sought to be made the basis of an alternative charge as in the present case. I do not say that the District Magistrate could not have recorded the statement of the present accused on the 11th of May. He might do so for the purpose of enabling himself to determine at the proper time whether or not the person concerned had fulfilled the condition on which the pardon was tendered to him after he was examined as a witness in the case.

The fact, that in this particular case no inquiry under Chapter XVIII of the Code was made, as the trial was held under the Defence of India Act, does not effect this conclusion: and it is not suggested before us that the circumstance can affect it in any way.

Even assuming that the pardon was properly tendered at the time, I am by no means satisfied that the examination of the accused at that time was provided by the section. The examination of the person as a witness in the case is obligatory under Section 337 (2). In the present case as no inquiry under Chapter XVIII was necessary according to the special procedure laid down in the Defence of India Act, the only examination of the accused as a witness in the case was possible at the trial. The examination of the accused, such as was held on the 11th May by the District Magistrate, is not provided by the section. It is urged that though such an examination does not fall under sub-Section (2) it is clearly covered by sub Section (4). The lower Court have accepted this view.

But I am unable to see how sub-Section (4) can help the prosecution. It does not in my opinion, provide for any examination of the person other than that required by sub-Section (2). But it only specifies the consequence of an examination by the Magistrate after the pardon is tendered. That examination has reference to the examination of the person as a witness at the inquiry under Chapter XVIII. It is clear that the examination as a witness in the case under sub-Section (2) could be held only at the enquiry under Chapter XVIII or at the trial. When a Magistrate tenders a pardon and examines him as a witness at such an inquiry, sub-Section (4) provides that he shall not try the case. It is conceivable that apart from this provision the Magistrate may be able to try the case if he finds, in the course of the inquiry under Chapter XVIII, that the offence is a minor offence triable by him, or if he happens to be a Magistrate specially empowered to try the case under Section 30 of the Code. Sub-Section (4) is, therefore, enacted to prevent the Magistrate, who examines the person as a witness in the case, from proceeding to try it; but it is not meant to provide for any examination of the person as a witness other than that indicated by sub-Section (2).

As I have already pointed out, the District Magistrate, for his own guidance, may examine him after tendering the pardon. But that would not be an examination required by Section 337, though even such an examination may perhaps disqualify

him from trying the case as the wording of sub-Section (4) is apparently wide enough to include it. I see no ground, however, to hold that any examination other than that mentioned in sub-Section (2) is required by sub-Section (4). It seems to me that the statement referred to in Section 339, sub-Section (2) is the statement made by the approver as a witness at the inquiry under Chapter XVIII or at the trial and no other. I am, therefore of opinion that the statement in question could not be used in evidence against him when the pardon is forfeited, and could not form the basis of the alternative charge laid against him.

I do not think that Section 164, Criminal Procedure Code, which was referred to in the argument, can apply to this statement. It is not recorded under that section. The District Magistrate's evidence makes it clear that he acted under Section 337. Even apart from that circumstance I do not think that the statement in question could properly be recorded under Section 164, which refers to statements of witnesses, who want to make them voluntarily before the inquiry or trial has commenced. A statement recorded when a pardon is tendered may not be completely voluntary statement. It is apparently made under the influence of the tender of pardon. Though that influence is legally permissible, subject to the provisions contained in Sections 337 to 339, it is sufficient to take the statement out of scope of Section 164. Apart from the pardon probably the statements in question, if the accused was then prepared to make it, could have been recorded only as a confession under Section 164.

I have considered the decision in *Bhallu Singh* v. *Queen Empress* (2) (Cr.) and *The Crown* v. *Andal* (1). Though we are not bound by them they are authoritative pronouncements on the construction of Section 337. After a careful consideration of the provisions of the Code, with great respect to the learned Judges, I am unable to accept their reading of Section 337. I have stated my reasons for the construction of the section which I accept. I do not suggest that the matter is free from difficulty. But on the whole it seems to me that the statement recorded by the District Magistrate is one not required to be recorded under Section 337 and cannot be made the basis of an alternative charge under Section 193, Indian Penal Code.

I would set aside the conviction and sentence and acquit the accused.

Rule made absolute.

(2) (1897) 3 P. R., 1897 Cr,

A. I. R. 1922 Bombay 144.

MACLEOD, C. J. AND SHAH, J.

Keshav Pandurang Lokhande and others—Defendants-Appellants

v.

Maruthi Krishna Shinde and others—Plaintiffs and Defendant No. 3-Respondents.

F. A. No. 249 of 1918 decided on 4th April, 1921, from a decision of 1st Class Sub-J., Sholapur in Suit No. 1105 of 1916.

Hindu Law—Widow—Savings from her limited estate is her absolute estate.

Where out of savings which a Hindu widow, who inherited ancestral property belonging to her minor son, made from the income of the property, she purchased the property belonging to her brother at a Court sale and subsequently conveyed the property back to her brother and on the widow's death, the reversioners sued to recover the property as an accretion to the ancestral property.

Held: the property belonged to the widow's brother, for there was never any intention on the widow's part that the property should form an accretion to the ancestral property in her hands. Under Hindu law, a widow has an absolute control over the income of the ancestral property which she inherits from her husband and can dispose of it as she pleases If she invests it then it will depend upon the facts proved whether she has shown an intention that the investment shall be an accretion to the ancestral property or whether she can hold it in the same manner as the savings with which she has purchased it. That must be a question of fact in each case. The fact that the investment is in the widow's name cannot in itself be a presumption that the investment is intended to be an accretion to the ancestral property. [P. 145, C. 1.]

Coyajee and *N. V. Gokhale*—for Appellants.

P. B. Shingne—for Respondents Nos. 1 and 2.

Macleod, C. J.:—Plaintiffs sued to recover possession of the moveable and immoveable property described in the plaint.

One Satwaji died in 1864 leaving his widow Sakhubai, Vithabai the widow of his pre-deceased son and a grandson Govinda. After Satwaji's death, his estate was managed by his widow Sakhubai until her death in 1867. Govinda died a minor in the same year. His mother Vithabai succeeded as his heir. The plaintiffs are the grandsons of Ramba,

the brother of Satwaji. The defendants are the sons of Vithabai's brothers.

The plaintiff's disputed various alienations made by Vithabai. They fall under three heads. The first was of certain property at Banegaon. The plaintiffs got a decree with regard to some of the properties at Banegaon and the decision of the lower Court has not been contested in appeal.

The second set of properties were originally the ancestral property of Vithabai's brothers, Rama and Pandu. These properties were sold in execution in 1876 and were eventually bought by Vithabai from the Court purchaser in 1882 and she conveyed them to her brothers in 1884. Admittedly they were purchased out of her savings of the income of the ancestral property. The learned Judge has held that when Vithabai purchased the property in her own name, she purchased it and made it an accretion to her husband's and son's estate, and that she could not give it away to her brothers unless it was validly necessary to do so. That decision has been impeached in appeal and we think it is wrong. Admittedly, the widow had an absolute control over the income of the property and could dispose of it as she pleased. If she invested it, then it would depend upon the facts proved whether she had shown an intention that the investment should be an accretion to the ancestral property or whether she could hold it in the same manner as the savings with which she had purchased it. That must be a question of fact in each case. The fact that the investment was in the widow's name could not in itself raise a presumption that the investment was intended to be an accretion to the ancestral property.

In *Istri Dutt Koer* v. *Hansbutti Koeyain* (1) the widows, shortly after the death of their husband in 1857, bought out of the savings of the income certain shares of land in which their husband had been a share-holder to a large extent. They made no attempt to alienate what they had purchased until in 1873. They sold without making a distinction between the original estate and the property purchased afterwards. It was held that the object of the alienation was not the need or the personal benefit of the widows, but a desire to change the succession, and to give the inheritance to the heir of one of themselves in preference to their husband's heir. It can be said that in that case the evidence showed that the widows had the intention, in the first instance, that the after purchases should be accretions to their husband's estate, and having kept them for over sixteen years and then alienated the property without making any distinction between the original estate and the after purchases, it could not be said that they had intended to keep the savings at their absolute disposal.

In *Saodamini Dasi* v. *The Administrator-General of Bengal* (2) the executor of the Will of a Hindu testator made over to the widow of the latter an aggregate consisting of accumulations of income accrued during eight years from her husband's death, undisposed of by his Will. The money was not received by her as a capitalized part of the inheritance, but as income that had been accumulated during her tenure of her widow's estate. The widow did not act as showing an intention on her part to make this sum of money, the greater part of which she invested in Government securities, part of the family inheritance for the benefit of the heirs. After the lapse of about twenty years she disposed of it as her own. It was held that the money so invested by the widow belonged to her as income derived from her widow's estate, and was subject to her disposition. It was pointed out in the judgment as follows:

"There was no estate of her husband's in her hands for her to augment. She did nothing to indicate an intention to make the fund received, or the interest on it part of her husband's estate which was in other hands or to justify the inference that she wished it to revert to her husband's heirs. It was said she had placed it in investments of a permanent nature. Had she done so, it does not appear to their Lordships that this circumstance alone would have added the fund to the estate devolving on her husband's heir."

No doubt, where the *corpus* is not in the hands of the widow, it would require very much stronger evidence to show that the savings of the income were intended to be

(1) (1883) 10 Cal. 324=10 I.A. 150=13 C.L.R. 418=4 Sar. 459 (P.C.).

(2) (1893) 20 Cal. 433=20 I. A. 12=6 Sar. 272 (P.C.).

an accretion to the *corpus* than when the *corpus* itself is in the hands of the widow.

In *Akkana* v. *Venkayya*, (3) these two cases were cited. A Hindu widow inherited certain property from her husband and with the income thereof acquired land on a usufructuary mortgage for fifty-two years. She assigned the unexpired portion of the term of the mortgage for consideration and subsequently died. The reversionary heirs to her late husband then sued her assignees for the property. There was no evidence that the widow had ever indicated any intention to make the property part of husband's estate for the benefit of his heirs. The learned Judges said:—

"In the present case, as already stated, there is no evidence that Parvattamma ever indicated any intention to make the mortgage property part of her husband's estate for the benefit of his heirs. The acquisition made by her out of the income of her husband's estate was not in the nature of an enlargement of that estate or of redeeming the same from an incumbrance or charge or in the nature of an appurtenance thereto; it was simply an investment, on a usufructuary mortgage, of her small savings over which she had absolute power of disposal, and it is difficult to see on what principle it is to be presumed that she thereby intended to part with her power of disposition for the benefit of her reversionary heirs. The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is nonetheless so when the fund with which the property is acquired is one which, though derived from her husband's property, was at her absolute disposal."

On the facts of this case, the property which originally belonged to Vithabai's brothers had been sold in execution of the decree against them. Then we find that Vithabai purchased that property from the auction-purchaser and soon after conveyed it back to her brothers. It seems to me, beyond all doubt, that there never was any intention on the part of Vithabai, that this property should form an accretion to the ancestral property in her hands. I think, therefore, that the learned Judge in the Court below was wrong in passing a decree in favour of the plaintiff's for these properties. Therefore the plaintiff's suit with regard to these properties should be dismissed.

With regard to the third set of properties at Bhogaon, the defendant succeeded and the plaintiffs filed cross-objections. These properties admittedly were purchased by savings of the widow and were bought in the name of Pandu her brother. So it cannot be said that there was any intention on the part of the widow that these properties should form an accretion to the ancestral property. The learned Judge was right in rejecting the plaintiff's claim as to the Bhogaon land.

The appeal must be allowed with regard to the second set of properties and the mesne profits thereof.

The appellants will be entitled to costs in proportion to their success throughout. Cross-objections are dismissed with costs.

Shah, J.:—I agree.

Appeal allowed.
Cross-objection dismissed.

3) (1901) 25 Mad. 351=12 M. L. J. 5.

A. I. R. 1922 Bombay 146.

MACLEOD, C. J. AND SHAH, J.

Hiralal Ravchand Shah—Plaintiff-Appellant

v.

Parbhulal Sakhidas Shah — Defendant-Respondent.

S. A. No. 358 of 1919, decided on 8th April, 1921, from the decision of D. J., Ahmedabad in A. No. 526 of 1916.

Dekkhan Agriculturists' Relief Act (XVII of 1879), S. 2—Agriculturist — Person deriving greater part of income from fruits of mango trees is an agriculturist.

The term "Agriculturist," as defined in Section 2 of the Dekkhan Agriculturists' Relief Act, includes a person who derives a greater part of the income from the fruits of the mango trees, even though he bestows no care or attention and labour on them. The test seems to be whether the income is derived from the produce of the land and not what is the actual quantum of labour which has to be bestowed in getting in the crop. [P. 147, C. 1.]

K. N. Koyajee—for Appellant.

H. V. Divatia—for Respondent No. 1.

Macleod, C. J.:—The plaintiff sued for possession of a certain mortgaged property, and for a declaration that the mortgages were nominal and passed without consideration; if they were passed for consideration then for an account of what might be found due to the first defendant. The first issue was whether the plaintiff was an agriculturist. Un-

doubtedly the major part of his income was derived from the produce of mango-trees. But it has been held in both Courts that he is not an agriculturist within the meaning of the word in the Dekkhan Agriculturists' Relief Act because the trees were full grown and received no attention from the plaintiff. He merely took the fruit when it was ripe. Undoubtedly, if a person derives the greater portion of his income from land by sale of the crops of any sort, and standing crops include fruit, he must be considered an agriculturist. If he owns certain fruit trees and lets out the right to take the fruits to tenants, he would be an agriculturist, if the greater part of his income consisted of the rents so received, and the Court would not have to enquire how much labour or care was bestowed on the cultivation of the trees. If he does not let out the right to take the fruit to tenants, but picks the fruit himself, it is difficult to see how he can in any sense be less of an agriculturist than if he let out the right.

The test seems to be whether the income is derived from the produce of the land, and not what is the actual quantum of labour which has to be bestowed in getting in the crop. If that were not so, it would be extremely difficult to know where to draw the line. For instance, if a man planted mango trees they would require a considerable amount of care, attention and labour until they arrived at a certain stage of growth, and the owner, so long as he was bestowing care, attention and labour on them, would be an agriculturist. But according to the defendant's argument when the trees became fruit bearing and no longer required care and attention but only the labour of picking the fruit, the owner, though deriving his income from the fruit, would no longer be an agriculturist. That seems to be the view of the Judge when he says: "According to the custom in this country the trees being full grown receive no attention whatsoever from the plaintiff. He does not water or manure or lop or otherwise deal with them."

I cannot agree with that view. Once it is proved that the plaintiff derives the greater part of his income from these mango trees, he must be considered an agriculturist, and will be entitled to the benefit of the Act. The appeal must, therefore, be allowed and the case sent back to the Trial Court to take an account of what is due under the suit mortgages under the Dekkhan Agriculturists' Relief Act. Costs will be the costs in the suit.

Shah, J. :—I agree.

Appeal allowed.

A. I. R. 1922 Bombay 147

MACLEOD, C. J. AND KANGA, J.

Moti Chand Raoji and another—Defendants Nos. 1, 2 & 3—Appellants

v.

Manekchand Ramchand Gojar and others—Plaintiffs-Respondents.

Appeal from Original Decree No. 127 of 1921, decided on 22nd March, 1922.

(a) *Hindu Law—Joint family—Intention to separate—Advance of money to father after the expression of intention but before actual division—Other members are liable.*

Although at the time of the advance of money to the father, the family had expressed the intention to separate, and in the eye of the law, they were no longer members of a joint Hindu family, yet if there had been no partition of the joint property the *onus*, would be upon the sons to show that the advance made to their father, was made after the actual division of that property so that they would no longer be liable for such advance. [P. 147, C. 2; P. 148, C. 1.]

(b) *Civil P. C, S. 100—Evidence not to be allowed to be led in appeal—Practice.*

There is no precedent for allowing an appellant to lead evidence, which could have been led in the Court below, in appeal. [P. 148, C. 1]

B. J. Desai and *R. G. Rele* and *Ratanlal*—for Appellants.

Coyajee and *W. K. Manker*—for Respondents.

Judgment:—This is an appeal filed by the original 2nd and 3rd defendants against the decree of the First Class Subordinate Judge of Sholapur in favour of the plaintiffs. Admittedly, the plaintiffs had advanced the money, which is sought to be recovered to the appellants' father on the 31st July, 1918. Although at that time the family had expressed the intention to separate, and in the eye of the law, they were no longer members of a joint Hindu family, yet if there had been no partition of the joint family property, the members of the family would continue as tenants-in-common and would be liable for the acts of that member of the family who was in charge of the joint property. The *onus*, therefore, would be upon the 2nd and 3rd defendants to show that the advance made to their father admittedly

for the purpose of a Ginning Factory and a shop at Latur in the Nizam's Dominions, was made after the actual division of that property so that they would no longer be liable for such advances. That was a fact, which if existed, would well be within the knowledge of the appellants. The 2nd defendant instead of giving evidence in favour of this contention supported the plaintiff's case. The third defendant never even went into the witness-box to prove that the Latur Factory had been actually divided amongst the members of the family before the advances were made.

The result is that unless the 3rd defendant is given an opportunity now of proving, what he never attempted to prove in the Court below, the appeal must necessarily fail. But there is no precedent for allowing an appellant to lead evidence, which could have been led in the Court below, in appeal. Even if he had applied for review in the Court below he could not have brought himself within the provisions of the Code; because it could be said that the evidence which he wanted to lead was not within his knowledge, when the suit was heard.

The result must be that the appeal must be dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 148.

MACLEOD, C. J. AND SHAH, J.

Trikam Lal and others—Defendants Nos. 2, 3 and 5-Appellants

v.

Nagendas Jeth Lal—Plaintiff-Respondent.

Appeal from Appellate Decree No. 524 of 1921, decided on 16th March, 1922.

Civil P. C., S. 100—New point of law requiring evidence cannot be allowed in second appeal,

If, for the first time, in Second Appeal various questions of law are raised and in order to decide them evidence would have to be taken, such questions of law are not admissible in Second Appeal. A deed of gift to be valid must be accepted by the donee; but nowhere was it suggested in the Court below that the deed was invalid, because it had not been accepted.

Held, it is not competent in Second Appeal therefore for the appellants to urge the invalidity of the gift on the ground of non-acceptance.

[P. 148, C. 2.]

G. N. Thakore—for Appellants.

R. J. Thakore—for Respondent.

Judgment :—The plaintiff sued to recover possession of the suit house, together with other reliefs with which we are not concerned in Second Appeal. With regard to the house two issues were raised in the trial Court. (1) Whether the deed of gift, dated 23rd February, 1901, set up in para. 4 of the plaint was duly proved, (2) whether the house referred to in the deed was the undivided family property of defendant 2, and the father of Bai Ganga, and issue (4) was whether the plaintiff was the Vahiwatdar of the Dharnada Khatu in the Sarangpur Street and was competent to file this suit. The Judge found that the deed of gift was proved; that the house referred to in the deed was not the undivided property of defendant 2, and the father of Bai Ganga, and lastly that the plaintiff was the Vahiwatdar of the Dharnada Khatu in the Sarangpur Street.

In appeal various grounds were taken for disturbing the decision of the Court below. But the issues which we have referred to were issues of facts and were found in First Appeal in favour of the plaintiff. For the first time in Second Appeal various questions of law have been raised, but in order to decide those questions of law evidence would have to be taken, and as we have often pointed out points of law of that description are not admissible in Second Appeal. For instance, it is alleged, and quite rightly, that a deed of gift to be valid must be accepted by the donee. The appellants urge that there is no evidence of acceptance of the gift in the case by Chhotalal.

But nowhere was it suggested in the Court below that the deed was invalid because it had not been accepted. There is no suggestion to that effect. In the written statement what was alleged was that Ganga passed no deed of gift relating to the suit property, and she had no power to will or gift away the property which was part of the joint family property. It is not competent now, in our opinion, for the appellants to urge that we should send the case to the lower Courts for a finding on the question whether the deed of gift was accepted by Chhotalal. The case was fought on the assumption that either the gift was made by Ganga of property which she was competent to dispose of or that there was no gift of such property. It was never suggested that the deed of gift remained with Ganga. Although at one time the plaintiff had not been in possession of the deed, it was

procured, as we are told now, at a later stage from the daughter of Chhotalal; and there is nothing on the record to lead us to suppose that as a matter of fact Chhotalal was not aware of the deed of gift or did not accept the trust imposed upon him.

Then the only other question is whether the plaintiff could sue, first, on the ground that it was a personal gift to Chhotalal, and not to him and those who succeeded him as *Vahiwatdars* of the Dharnada Khatu; and secondly because the plaintiff had not proved that he was a *Vahiwatdar*. As the deed stands, there is no doubt that it was a deed to Chhotalal in his representative capacity as *Vahiwatdar*, and it has been found as a fact that the present plaintiff is the *Vahiwatdar*, and there is no reason why he should not be competent to maintain a suit. For these reasons the appeal fails and must be dismissed with costs.

We must make it clear that the plaintiff gets decree as *Vahiwatdar* of the Dharnada Khatu in the Sarangpur Street and holds the property as trustee under the trust referred to in the deed of gift.

Appeal dismissed.

A. I. R. 1922 Bombay 149 (1).

MACLEOD, C. J. AND SHAH, J.

Bai Sita, widow of Shankleshwar Bhawanishanker—Plaintiff-Appellant

v.

Bhogi Lal Amritlal and others—Defendants-Respondents.

App. from Appellate Decree No. 323 of 1921, decided on 17th March, 1922.

Will—Oral Will—Proof—Recital in an unregistered deed is admissible.

The fact of the oral will can be proved by the admission of the plaintiff, although it is found in a recital in a deed which, to take effect as a deed of gift, would require registration. If the recital is required to be used to prove an oral will, then it can be proved, and any question of registration is irrelevant.

G. N. Thakore—for Appellant.

R. J. Thakore—for Respondents.

Judgment:—The appeal must be dismissed with costs. It is really a question of fact whether the property was the subject of an oral will by the plaintiff's husband. She after her husband's death was in possession of the property. But later on an entry was made in the Record-of-Rights in favour of the defendant. The plaintiff filed a suit for the rectification of the Record-of-Rights and she lost in both the Courts below on the ground that she had admitted in a deed of gift with regard to the suit property that her husband had bequeathed the property to the defendant by an oral will. The fact of the oral will could be proved by the admission of the plaintiff, although it was found in a recital in a deed which, to take effect as a deed of gift, would require registration. If the recital was required to be used to prove an oral will, then it could be proved, and any question of registration was irrelevant. The appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 149 (2).

MACLEOD, C. J. AND CRUMP, J.

Haridas Chakubhai—Defendant-Applicant

v.

Ratansey Raghavji—Plaintiffs Respondents.

Civil Ex. Application No. 96 of 1921, decided on 9th April, 1921, from a decision of Bombay Court of Small Causes in Suit No. 2662 of 1921.

Civil Procedure Code (Act V of 1908), S 115—Point of law not taken in lower Court—High Court not to interfere in revision.

If a party does not choose to take a point of law in the Court below, then it cannot be said that the lower Court has acted illegally or with material irregularity in deciding the case without taking into consideration a point of law that was never raised before it. If the High Court entertains an application for revision on the ground that has not been taken in the Court below it should be exceeding the powers that are granted to the High Court to exercise a revisional jurisdiction over the decisions of the lower Courts.

[P. 150, C. 2.]

Coyajee and *G. N. Thakor*—for Applicant.

Macleod, C. J.:—This is an application by the defendant in ejectment proceedings in Small Cause Court, No. 2662 of 1921, asking us to interfere under our revisional jurisdiction as defined by Section 115 of the Civil Procedure Code.

The plaintiffs sought to eject the defendant from a shop in the Mulji Jetha Cloth Market on the ground that after the fire last monsoon, the defendant, having been burnt out of his shop, asked the plaintiffs to allow him to use a part of their shop to continue his business. The plaintiffs gave him permission, thinking that the defendant's goods would be sold

off in a short time. The plaintiffs having themselves been given notice wished to get possession from the defendant. The defence raised in the Court of Small Causes was that the defendant was a partner of the plaintiffs. It was suggested that that the Small Cause Court had no jurisdiction to enter into that question. That must be a question material for the determination of the suit, whether the defendant was in the shop as a partner or only by permission of the plaintiffs. The defendant having raised that defence, there was no reason whatever why the Small Cause Court should not have dealt with the question whether as a matter of fact there was a partnership. The defendant failed to prove that he was a partner, and it had to be admitted that there was no partnership writing nor was there anything in the account books to show that a partnership had been entered into. As a matter of fact, the business carried on by the plaintiffs was in English piece-goods while the business carried on by the defendant was in Country Piece-goods. Even supposing that the plaintiffs, as consideration for allowing the defendant to use their shop after the defendant's shop had been burnt, arranged that they should be paid one and half annas of the profits of the defendant's business, that would not constitute a partnership between the two. There is no reason, therefore, on a pure question of fact, for this Court to interfere.

A new question has been raised before us, whether, when the plaintiffs gave notice to the defendant, the plaintiffs' title had been determined. The defendant relies on the explanation to Section 43 of the Presidency Small Cause Courts Act. He never raised that point in the Small Cause Court and never attempted to prove that plaintiff's title had been determined prior to the date of the application to the Small Cause Court for possession. No doubt it appears that the plaintiff had received notice from his landlord, but we are not aware of what nature the notice was, and it is not the function of this Court in revision to entertain a point of law which has not been taken in the Court below. None of the provisions of Section 115 of the Code of the Civil Procedure apply to such a case. If a party does not choose to take a point of law in the Court below, then it cannot be said that the lower Court has acted illegally or with material irregularity in deciding the case without taking into consideration a point of law that was never raised before it. If we entertain this application on that ground we should be exceeding the powers that are granted to the High Court to exercise revisional jurisdiction over the decisions of the lower Courts. The application must be refused

Application refused.

A. I. R. 1922 Bombay 150.

MACLEOD, C. J. AND SHAH, J.

Chand Bhai Mahamadbhai Vohra—Plaintiff-Appellant v.

Hasinbhai Rahimtoola Vohra—Defendant-Respondent.

S. A. No. 805 of 1920, decided on 5th July, 1921, from a decision of Joint Judge, Ahmedabad in A. No. 78 of 1919.

Adverse possession— Co-owners—Sole possession and enjoyment by one without denial of the right of the others is not adverse to the others—But ouster, may be presumed from sole possession for long period.

The sole possession by one of two joint owners itself is no evidence of the denial of the right of the other joint owner, and time does not run against the joint owner out of possession until the joint owner in possession has done some act to the knowledge of the other which amounts to a denial of the latter's right. No doubt it is perfectly correct to say that sole possession by one tenant-in common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenant-in-common may be presumed

[P. 151, Cs. 1, 2.]

G. N. Thakor—for Appellant.

H. V. Divatia—for Respondent.

Judgment :—The plaintiff sued for a declaration that the suit property was the joint property of the plaintiff and the 1st defendant, and that the 2nd defendant who had purchased some of the property from the 1st defendant alone had no interest in the property, and for partition. He alleged that the plaintiff and 1st defendant had purchased the suit property in union in July, 1894. Hence the suit for partition. The 1st defendant contended that plaintiff was never in possession and enjoyment of the suit property, that it was in his exclusive possession and enjoyment and that the plaintiff's suit was barred ; that the suit property was purchased in the name of the plaintiff and defendant, but plaintiff could not pay his share of the money. Hence the property was in the 1st defendant's exclu-

sive possession and enjoyment. Unfortunately on these pleadings the proper issues were not raised. This admittedly was a case in which the property had been purchased by the plaintiff and the 1st defendant as joint owners. In order to pay for the property a *san* mortgage was executed, and it was not until 1905 that the 1st defendant alone redeemed the *san* mortgage.

The position of joint owners has more than once been explained in these Courts. The sole possession by one of two joint owners itself is no evidence of his denial of the right of the other joint owner, and therefore, time does not run against the joint owner out of possession until the joint owner in possession has done some act to the knowledge of the other joint owner which amounts to a denial of that joint owner's right. The fact that the 1st defendant redeemed the mortgage of 1905 even although the plaintiff was aware of it, cannot amount to a denial of the plaintiff's right. It would entitle the 1st defendant to a lien on the whole property for the plaintiff's share of the mortgage-debt. No issue was raised in the trial Court as to whether there had been an ouster of possession to the knowledge of the plaintiff for more than twelve years. But evidently the question of adverse possession was in the mind of the Court. The Court said: "The whole question of adverse possession would depend upon one fact; knowledge of the plaintiff." That is quite wrong. The mere fact that the plaintiff knew that the 1st defendant was redeeming the mortgage could not possibly amount to an ouster. The Trial Judge dismissed the suit apparently on his finding on issue No. 2 which was—Was plaintiff even in possession and enjoyment of the suit property within twelve years next prior to the suit. The finding is recorded in the affirmative in the print at p. 6, but that is evidently a mistake. That is not the proper issue in a suit by one co owner for possession against the other co-owner.

In appeal apparently the case for the appellant was not properly argued. The learned Judge says: "On the other hand the respondent No. 1 had adduced abundant evidence to show that he alone redeemed the suit property. The appellant had knowledge admittedly of that redemption. As soon, therefore, as it is proved beyond reasonable doubt that the appellant co-mortgagor had not joined in redeeming the mortgage, his suit brought after twelve years must fail. That proposition of law is not assailed before me." That proposition of law again is absolutely wrong, and it is difficult to understand how the appellant's pleader could have assented to it. Then the learned Judge proceeds: "The 2nd issue before the trial Court was—Was plaintiff ever in possession and enjoyment of the suit property within twelve years next prior to the suit?" and that, as we have already pointed out, was a wrong issue altogether. The learned appellate Judge concurred with the conclusion of the trial Court that it should be found in the negative. Consequently the appeal was dismissed.

Really the only question in the case was whether the defendant could prove facts which would amount to an ouster for twelve years. He attempted to prove that the plaintiff had been out of possession for twelve years. But there is nothing on the record to show that defendant No. 1 had ever done anything which could amount to a denial of the plaintiff's right to joint possession.

We have been referred to the case of *Gangadhar* v. *Parashram* (1) and no doubt it is perfectly correct to say that sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenant-in-common may be presumed. In that case the sole possession of one tenant in-common had been proved for nearly fifty years, and therefore, there was sufficient ground for presuming that sole possession for so long a period amounted to a denial of the right of the other tenant-in-common who was out of possession.

It cannot be said in this case that the mere fact that the 1st defendant was in possession of the property, jointly purchased in 1894, and that he paid off the mortgage in 1905 was an indication that he denied the right of the plaintiff to share in the property. The plaintiff, therefore, is entitled to the declaration he asked for, unless we consider that this was a case in which we should send down

(1) (1905) 29 Bom 300=7 Bom. L. R. 252,

an issue to be tried with regard to adverse possession. But we do not think it is the function of this Court in Second Appeal to remedy the defects in a party's case, as the 1st defendant, if he wished to rely upon ouster of his co-owner, should have pleaded that, and should have adduced evidence as to ouster.

The Judge has referred to something which the 1st defendant stated in his evidence with regard to a release by the plaintiff when the 1st defendant redeemed the mortgage. We do not think we should pay the slightest attention to such an allegation made by the defendant for the first time in his evidence when no doubt he began to appreciate the difficulties of his position. The appeal must be allowed. It will be declared that the suit property is the joint property of the plaintiff and the 1st defendant, and that the 2nd defendant by his purchase from the 1st defendant acquired only the right, title and interest of the 1st defendant, and there must be an account of what is due to the 1st defendant by the plaintiff as his share of the mortgage debt which was paid off by the 1st defendant; and there will also be a decree for partition of the suit property, and an enquiry as to mesne profits from the date of the suit.

The property is a very small one, and there is no reason why the parties should not agree as to the amount to be paid for the plaintiff's share of the mortgage-debt, and as to what is due by the 1st defendant for the plaintiff's share of the mesne profits, in order to obviate the taking of accounts to ascertain such small amounts. An order will have to go to the Collector for partition. The plaintiff will get his costs throughout. *Decree reversed.*

A. I. R. 1922 Bombay 152.

MACLEOD, C. J. AND SHAH, J.

Mahomedbhai Husenbhai and others—Plaintiffs-Appellants

v.

Admji Halimbhai and others—Defendants-Respondents.

Appeal No. 4 of 1919, decided on 22nd July 1921, from an Order of First Class Sub-J., Surat in Suit No. 333 of 1913.

(a) *Civil Procedure Code, S. 20—Some defendants living outside jurisdiction—Leave not given—Suit cannot go on.*

Defendants Nos. 2, 3 and 5 were residing at Delagoa Bay, and under Section 20 of the Civil Procedure Code, the Surat Court was asked to grant leave to sue them as defendants. That leave was refused.

Held, the Court having refused to grant leave as against the defendants outside the local limits, unless the plaintiffs could get those defendants to acquiesce in the institution of the suit at Surat, clearly the suit could not go on. [P 153, C. 2.]

(b) *Civil Procedure Code, O 2, R. 2—Second suit for rent for period covered by first suit is barred.*

Where the plaintiff in his first suit failed to claim the whole of the rent due.

Held, a subsequent suit for rent was barred by Rule 2, Order 2. [P. 153, C. 2]

(c) *Civil Procedure Code, O. 7, R. 11—Plaint not disclosing cause of action should be rejected—Trustee—Mortgagor is not liable to account to beneficiary unless realisation from estate leaves surplus after paying mortgage.*

Ordinarily a mortgagor or those responsible for the mortgagor's estate will not be liable to account to the beneficiaries unless it can be shown that the sale had realised sufficient to pay off the mortgage, and left a surplus, and that the surplus was in the hands of the person from whom an account was claimed. But the plaintiffs are not in a position to allege anything of the sort.

Held, as the plaint does not disclose a cause of action, it should be rejected. [P. 154, C. 1.]

(d) *Civil Procedure Code, O. 7, R. 10—Suit not instituted in wrong Court—Rule does not apply.*

Where there was nothing to prevent a suit being instituted in a Court if the proper procedure had been followed, in which case it would have been decided on merits.

Held, the only course for the Court was to dismiss the suit As it is not a case in which the suit should have been instituted in another Court, Rule 10 of Order 7 does not apply [P. 154, C. 1.]

G. N. Thakor—for Appellants.

K. N. Koyajee—for Respondents.

Judgment:—This was a suit originally instituted in the Bulsar Court by the plaintiffs who are the heirs of one Husenbhai Abderehman, deceased, for an account of the management which his co-sharer and trustee deceased Sulemanji and his successors, the defendants, or any of them, might have made of the share of the said Husenbhai in the plaint house, and of the amount which the deceased Sulemanji or the defendants or any of them might have received by mortgaging and selling that share, and for recovering the amount that might be found due, with costs. The Bulsar Court decided that it had no jurisdiction, and accordingly the plaint was presented thereafter in the Court of the First Class Subordinate Judge at Surat.

The facts are that Husenbhai and Sulemanji were paternal cousins, originally residents of Bulsar, who traded in partnership in Delagoa Bay in Portuguese South Africa and from the partnership money they purchased a house called the

"the new house." Husenbhai withdrew from the partnership in or about 1890 and came back to Bulsar. As the original sale-deed of the house was in Husenbhai's name, he before returning to India, executed a deed of transfer in favour of Sulemanji, but by the mistake of the writer the whole house, instead of half only, was mentioned in the deed. Sulemanji, however, admitted Husenbhai's right to the half share and there was thus a resulting trust in his favour. Sulemanji realised the rent of the house and sent some amount to Husenbhai till his death in 1897 and then to plaintiff No. 1. Sulemanji died in July, 1902 after making a Will. One Ismail Haji Halimbhai was appointed executor by that Will, and in that capacity he took charge of the "new house" along with the other property of Sulemanji and continued to manage it until January or February, 1903. Then Mahomed Sulemanji, Abderehman Sulemanji and Bai Hava, widow of Sulemanji got the Will of Sulemanji set aside by the Court of Delagoa Bay and obtained possession of the property of Sulemanji including the "new house."

Mahomed Sulemanji thenceforward realized the rent, but did not give anything to the plaintiffs, nor did he render any account of their share. The plaintiffs alleged that they did not know that Sulemanji's will had been set aside and that possession of his property had been given to Mohamed Sulemanji. Suit No. 385 of 1907 was brought in the Bulsar Court against Ismail Haji Halimbhai for account, and having then been informed that the Will had been set aside, they made Sulemanji's heirs parties to the suit and a decree for account of the property up to the death of Sulemanji was eventually passed in their favour on the 23rd July, 1912.

They alleged in their plaint in this suit that during the pendency of that suit they came to know that Sulemanji had mortgaged the house to a Bank, that under the terms of the deed the Bank had taken possession of it in 1906 and had got it sold for its debt in 1907 or 1908. They claim, therefore, that the defendants are liable to account to the plaintiffs as trustees.

Defendants Nos. 2, 3 and 5 were residing at Delagoa Bay, and it appears that, under Section 20 of the Civil Procedure Code, the Court was asked to grant leave to sue them as defendants. That leave was refused and there is nothing in the case to show that these defendants acquiesced in the institution of the suit. They never entered an appearance. Now the plaintiffs' claim falls under two heads, first, an account of the management of the house until it had got into the possession of the mortgagees; and, secondly, an account of the sale proceeds after the mortgage property was sold by the mortgagees. On the first question the issue framed was, whether the Court had jurisdiction to entertain and try the suit.

Under Section 20, Civil Procedure Code, the Surat Court had jurisdiction to try the suit and could have continued with the hearing if all the defendants resided within the local limits of the jurisdiction, or, if any of the defendants did not so reside either when the Court had given leave, or, in the alternative, if no leave was granted, if those defendants residing outside the local limits had acquiesced in the institution. But the Court having refused to grant leave as against the defendants outside the local limits, unless the plaintiffs could get those defendants to acquiesce in the institution of the suit at Surat, clearly the suit could not go on. The suit was against all the defendants for an account, and, if the plaintiffs had struck out the defendants who were residing outside the jurisdiction, possibly they would have got a decree in the Surat Court against those defendants who resided in the local limits. But that is not what they have attempted to do. They have continued fighting a suit which in its inception was bad.

With regard to the first head as to the account of the management of the house, clearly they could not get an account of the rents from parties who never had been in Delagoa Bay, and further as their suit for an account of the rents had been filed in 1907, after the house had got into possession of the Bank, they should have sued in that suit for an account of the rents which had been received up to the date of the suit. They have failed to do that, and so under Order II, Rule 2 they are barred from suing for an account of those rents in another suit.

Then as regards the account of the sale proceeds, they never alleged facts on

which the cause of action could be founded. What happened when the property came into the hands of the mortgagees is wrapt in obscurity. Ordinarily a mortgagor or those responsible for the mortgagor's estate will not be liable to account to the beneficiaries unless it can be shown that the sale had realised sufficient to pay off the mortgage, and left a surplus, and that the surplus was in the hands of the person from whom an account was claimed. But the plaintiffs are not in a position to allege anything of the sort. Therefore, they have not alleged any of the things which would have to be proved before the Court could pass the decree. Therefore, the plaint might well have been rejected as not disclosing a cause of action.

Apart from that, clearly the Court was right in deciding that the provisions of Section 20, Civil Procedure Code, had not been complied with, and the suit could not go on with the defendants Nos. 2, 3 and 5 still on the record. The proper course really then for the Court to have followed was to reject the plaint. But it is suggested that the Court was wrong in dismissing the suit when it ought to have returned the plaint on the ground that it had no jurisdiction to try the suit. But I think there is some confusion in this argument. Under Order VII, Rule 10, it is no doubt obligatory that the plaint, if instituted in the wrong Court, shall at any stage of the suit be returned to be presented to a Court, in which the suit should have been instituted. But it is only in a case where the suit is instituted in a wrong Court that the plaint must be returned. There was nothing to prevent the suit being instituted in the Surat Court, if the proper procedure had been followed. If leave had been obtained, or if these Delagoa Bay defendants had entered an appearance, then the suit would have proceeded and it would have been heard on its merits. This was not a case in which the Court ought to have returned the plaint because it ought to have been instituted in another Court.

Therefore the only course for the Court was to dismiss the suit. If from the allegations in the plaint it appeared that there was no cause of action, then the proper course to adopt was to reject the plaint. But the plaintiffs did claim an account of the rents of the house, and that, as I have shown, is barred under Order II, Rule 2, so that part of the plaint could not have been rejected as not disclosing any cause of action. The only course now, I think, is to dismiss the appeal with costs. Costs to be taxed taking the appeal as from a decree, not from an order.

Shah, J.:—I agree. The only question on this appeal is whether the lower Court had jurisdiction to deal with the suit in the absence of certain defendants who did not reside in the jurisdiction of the Court, but resided in Delagoa Bay in Portuguese territory. The cause of action is not stated in the plaint clearly. It is clear, however, that so far as the principal cause of action is concerned, namely, the receipt of the sale proceeds of the house in Delagoa Bay sold in satisfaction of a mortgage on that house, and the liability of the defendants to account for the same, it arose outside the jurisdiction of the Court; and it is not suggested before us that the case falls under Clause (*c*) of Section 20 of the Code of Civil Procedure. The only ground upon which the jurisdiction is claimed is that some of the defendants resided within the jurisdiction of the Court. It is true that some of the defendants did reside within the jurisdiction of the Court; but it is also clear that some did not reside within the jurisdiction of the Court; and though an attempt has been made during the course of the argument to show that they must be taken to be residing for the purpose of the suit at Bulsar within the jurisdiction of the Court, in spite of the fact that they lived in Delagoa Bay for the purposes of their business, it is clear that the case must be decided on the footing that those defendants really resided outside the jurisdiction of the Court. The argument that they resided at the time of the suit at Bulsar cannot be accepted. That being so, it is clear that as the leave to allow the suit to proceed against those defendants was refused under Clause (*b*) of Section 20 of the Code, the Court had no jurisdiction to proceed with the suit at least as regards those defendants.

It is contended, however, on behalf of the plaintiffs here that the suit should have been proceeded with as regards the other defendants who resided in fact at the date of the suit in the jurisdiction of the Court.

It is clear from the nature of the cause of action as stated in the plaint that the suit could proceed, if at all, against all the defendants as there is no allegation against a particular defendant residing within the jurisdiction of the Court that he received any amount of the sale proceeds in respect of which the suit is brought. That being so, the suit could be proceeded with only if all the defendants in the present action were properly before the Court. As some of the defendants who resided outside the jurisdiction of the Court were not before the Court, it follows that the whole suit must be dismissed for want of jurisdiction.

As regards the form of the order, I entirely agree that under the circumstances the only proper order that could be made is to dismiss the suit. The first order that was made by the Bulsar Court returning the plaint to be presented to the proper Court, that is to the Court of the First Class Subordinate Judge at Surat was a proper order, the suggestion that a similar order should be made in the suit a second time seems to me to be outside the spirit and the letter of the rule on which the plaintiffs have relied.

Decree confirmed.

A. I. R. 1922 Bombay 155.

MACLEOD, C. J. AND COYAJEE, J.

Govind Balakrishna Bave and others—Plaintiffs-Appellants

v.

Secretary of State for India in Council and others—Defendants-Respondents.

Appeal from Original Decree No. 42 of 1921, decided on 6th March, 1922.

Vatan Act, Ss. 64, 18—Suit to declare Vatan Register void—No order under S. 4(a), para. 3 of the Rev. Jurisdiction Act—Suit does not lie—No action can be taken under S. 18 without an application.

Where the order given by the Collector is not an order within the meaning of Section 4 (*a*), Para 3, Revenue Jurisdiction Act, but merely a direction to give effect to the Vatan Register as settled in 1895 a suit to declare that a Vatan Register was void and should not be given effect to would certainly not lie. No action will be taken under Section 18 unless an application is made by an interested party. [P. 155, C. 2.]

K. H. Kelkar—for Appellants.

The Government Pleader—for Respondent No. 1.

B. V. Desai—for Respondents Nos. 3 and 6.

Judgment:—The plaintiffs filed this suit in effect to get a declaration that the Vatan Register prepared in 1895 was incomplete, unauthorised and not fit to be given effect to. It seems that the Register was prepared after the inquiry under Section 64 of the Vatan Act. But in 1916 the Mahars complained that they were not getting the remuneration prescribed by the Register. On the 11th February, 1918, a direction was made by the Prant Officer that as the village was declared as Khalsa the *punji* collections in a head of corn was directed to be collected directly from the Nayat people, and there should be no objection to that course being adopted and arrangement should be made to enforce the recovery of *vasool* in that behalf from such people as might not of their own accord willingly pay that up.

On the 15th February, 1918, the Collector confirmed the opinion expressed by the Prant Officer and directed that orders to that effect should be issued and arrangements should be made and the question as to what the services were that were to be rendered by the Mahars should be settled and from certain exhibits, particularly, Exhibit 68, it would appear that an inquiry is now going on as to what services should be rendered by the Mahars.

The plaintiff's chief complaint is that the Vatan Register is incomplete because it does not set out what duties were to be performed by the Mahars. I doubt whether the order or direction given by the Collector on the 15th February, 1918, was an order within the meaning of Section 4 (*a*), Para 3, of the Revenue Jurisdiction Act. It seems to me, it was really a direction to give effect to the Vatan Register as settled in 1895, and, in the circumstances of this case, a suit to declare that a Vatan Register was void and should not be given effect to would certainly not lie. The plaintiffs complained that the provisions of Section 18 of the Vatan Act were not followed. But there was no necessity for the authority to refer to Section 18, until an application had been made by a party interested, and it was always open at any time for the plaintiffs to apply, so that an inquiry could be made what were the services to be rendered by the Mahars, so that these services could be entered in the Vatan Register. Instead of making that application they filed this suit, which in my opinion is not

competent and must accordingly fail. In dismissing the suit on these grounds, it follows that nothing has been decided with regard to what are the proper services to be performed by the Mahars. In any event that is a matter to be decided purely by the Revenue Officers, and is now being considered by them.

The appeal must be dismissed with costs. Separate sets of costs.

A. I. R 1922 Bombay 156 (1).

MACLEOD, C. J. AND SHAH, J.

Keshav Narayan Shastri Prabhane – Defendant-Appellant

v.

Ramchandra Ganesh Prabhane and another —Plaintiffs-Respondents.

Letters Patent Appeal No. 15 of 1921, decided on 13th March, 1922.

Hindu Law—Joint property—Notice by one co-sharer to other refusing right in property if he did not pay his share of redemption money, is not ouster—Ouster cannot be presumed for short possession—Adverse possession.

Mere notice by one co-sharer who redeemed mortgaged joint property to the other to the effect that, if he did not pay his share of the amount required for paying off the mortgage, he will have no right over the property redeemed is not sufficient to constitute ouster. If since the date of the notice the defendant has not been in possession of the family property sufficiently long, it cannot be presumed that such long possession amounts by itself to an ouster. [P. 156, C. 2.]

S. S. Pathar—for Appellant.

M. P. Patwardhan—for Respondents.

Judgment:—Two questions have been argued in this Letters Patent Appeal; first whether the notice of the 9th August, 1901, was received by the plaintiff. It appears that the plaintiff and his brother Gopal were residing away from the defendant who was in possession of the family property. That property was mortgaged, and the mortgage was redeemed by the defendant. He sent notice to the plaintiff and his brother Gopal as follows: "Our ancestral land was in mortgage with Ghanashama Birdichand. We have paid him off for your share including the principal and its interest Rs 1,600, you should pay this amount within two months; otherwise you will not have any right whatever over this property." There is no evidence whatever that the plaintiff received this notice.

With regard to the notice sent to Gopal, the postal acknowledgment is returned purporting to be signed by Gopal but the signature on the acknowledgment, in the first place, is not proved to be that of Gopal; and secondly does not even on the face of it purport to be the signature of Gopal.

With regard to the notice served on the plaintiff he has denied having received it, and that being so, the presumption which might arise from the notice having been despatched to his address by post would be annulled.

With regard to the notice served on Gopal, who is now dead, all that we know is that the acknowledgment has been received, but it does not bear the signature of Gopal. At this distance of time, therefore, it would be extremely inadvisable for a Court to presume that Gopal had received the notice.

But apart from that even supposing that the notices had been received by the plaintiff and Gopal, we agree with the decision of the Court below, that that notice does not amount to an ouster. The mere assertion by one co owner in possession of property that the other co-owner has no right to the property by itself would not be sufficient to constitute ouster. It might be preferred by evidence of exclusion of the other persons, interested in the property uninterrupted for a very long time. But it cannot be said that since the date of the notice the defendant has been in possession of the family property for so long that it could be presumed that such long possession amounts by itself o an ouster, even if it be annexed to the notice of August, 1901.

We think, therefore, that the appeal must be dismissed with costs.

Appeal dismissed.

A. I. R 1922 Bombay 156 (2).

MACLEOD, C.J. AND SHAH, J.

Anandrao Purshottam Hathar—Plaintiff-Appellant

v.

Bhikaji Sadashiv Vaishempayan—Defendant-Respondent.

S. A No. 175 of 1919, decided on 5th July, 1921, from a decision of Asst. J., Thana in A. No. 243 of 1916.

Mortgage — Redemption — Property lost through negligence of mortgagee — Liability to account for, must be decided in the redemption suit itself.

The mortgagee is liable for the restoration of such property as he has through negligence allowed to pass into the hands of third persons and the question as to what the liability of the mortgagee is to account for the properties of which he was given possession should be determined in the suit for redemption itself and not be left to be decided in a separate suit.

G. S. Rao—for Appellant.

V. B. Virkar—for Respondent.

Macleod, C. J.:—The plaintiff sued for redemption of a possessory mortgage executed in favour of the defendants' ancestor by the plaintiff's father. Accounts were taken and it has been found that Rs. 7,301-6-9 are due by the plaintiff on the mortgage. The question arose whether the mortgagee was in a position to give back possession to the plaintiff of all the lands of which he had taken possession when the mortgage was executed. The trial Court held that no lands had been lost through the negligence of the mortgagee. The appellate Judge found that the mortgagee had been put in possession of all the mortgaged lands, but that the Commissioner appointed had found that eleven pieces of land were not in the mortgagee's possession at the time of his inquiry. Then the Judge said:—

"Considering the precarious condition of the lands which required constant care and repairs, it is likely that some of the lands were neglected and this neglect opened the door to trespassers. Now the question as to whether these trespassers have acquired indefeasible title to these lands is one which could be settled only by making the holders parties to this suit. This would complicate the suit into a tangle which would be against the policy of the Civil Procedure Code to create. The matter will have to be fought out in separate suits, if necessity should arise hereafter."

Now the liability of the parties to the mortgage in a redemption suit can only be decided once, and if this decree were to stand, the plaintiff would get back on payment of the mortgage-money only the Survey Numbers in the mortgagee's possession. He would then, according to the decision of the lower appellate Court, be relegated to filing a number of suits against persons in possession of those lands which the mortgagee has not restored, and if he failed to get possession the question would arise whether he could have recourse to the mortgagee for damages. But certainly it is not the policy of the Code to allow such proceedings. The question what is the liability of the mortgagee to account for the properties, of which he got possession, must be determined in this suit and if the mortgagee will not give back possession of the lands, of which he was given possession, then he must pay for them, for he is liable for the restoration of the lands which have got into the hands of strangers.

Therefore the suit must go back to the lower appellate Court in order that it may determine the mortgagee's liability with respect to the lands mentioned in para. 3 of the judgment. It will then be in the mortgagee's interests to arrange with the persons who are in possession to restore possession to the plaintiff. But if those persons do not restore possession then certainly the mortgagee will be liable. The Court will return its findings to this Court within six months.

The plaintiff must get his costs of the appeal here and in the District Court.

Case remanded.

A. I. R. 1922 Bombay 157.

MACLEOD, C. J. AND SHAH, J.

Shankar Balakrishna Torne—Plaintiff-Appellant

v.

South Indian Railway—Defendants-Respondents.

Small Cause Court Suit No. 1147 150075 of 1920, decided on 23rd June, 1921, by the Third Judge, Small Causes Court, Bombay.

Railways Act, S. 77—Goods taken along several Railways—Mistake of one Railway in taking goods along wrong route—Other Railways are not liable—Notice only to one Railway—Other Railways not liable.

The plaintiff consigned certain goods to be carried along three Railways. By mistake of one Railway they were taken to a wrong place from which place they were at last brought back in damaged condition. The plaintiff gave notice within six months to one of the Railways and after six months to the remaining. The plaintiff contended that no notice was necessary as the Railways were guilty of tortious act and the Small Cause Court referred the question to the High Court for opinion whether notice under Section 77 was necessary.

Held: that the plaintiff could not recover damages from the Railways to which he has failed to give notice within six months as required by Section 77: that the company which had received notice within time was not

liable for the mistake of the Railway which gave the plaintiff cause for claiming damages; that the diversion of goods by one of the Railways amounted to a breach of contract; it could not be called a tortious or wrongful act. Section 77 applies to the plaintiff's claim for damages as it deals with "claim for deterioration of goods delivered to be carried by Railway," under which class his claim falls. [P. 158, Cs. 1, 2.]

Rangnekar—for Plaintiff.

K. B. Dastur—for S. I. Railway.

Binning—for M. & S. M. Railway.

Macleod, C. J.:—This is a case stated for the opinion of the High Court by Mr. Billimoria, Third Judge, under Section 69 of the Presidency Small Cause Courts Act and Order XLVI, Rule 1 of the Code of Civil Procedure.

The facts are set out in the case, and the second question propounded is, whether, under the facts and circumstances as found, notice under Section 77 of the Indian Railways Act was necessary to be given, and whether the plaintiff not having given such notice could maintain the action. If that question is answered, as the Judge thinks it should be answered, in the affirmative, then there is no necessity to deal with the first question.

The goods in question were consigned to the S. I. Railway to be carried to Wadi Bunder in Bombay *via* Ernakulam, Jallarpet and Raichur. By some unfortunate mistake the goods went from Jallarpet *via* Madras all along the East Coast up to Waltair which is the terminal station of the M. & S. M. Railway, and at Waltair they were delivered to the Bengal Nagpur Railway which carried them on its line up to Ramkishtopore.

Eventually the goods reached Bombay in a damaged condition. The suit was filed to recover damages for the deterioration of the goods. It is contended by the plaintiff that there was no deterioration of goods within the meaning of Section 77 of the Indian Railways Act, and therefore notice was not necessary. The only possible basis for that argument would be a finding that the Railway Company had been guilty of some tortious act. But the evidence only points in this case to a mistake on the part of the Railway Company's servants whereby a wrong label was attached to the wagon with the result that the wagon went by the wrong route. That may be a breach of the contract. It certainly cannot be described as a tortious or wrongful act. It seems to me obvious that this claim of the plaintiff comes within Section 77 which deals with claims for deterioration of the plaintiff's goods delivered to the Company to be carried by them. As a matter of fact notice was given to the G. I. P. Railway Company within six months. But unfortunately the plaintiff did not realise that there were three Companies concerned, and therefore, did not serve notices on the other two Companies; and clearly as the G. I. P. Railway Company were not liable for the acts of the M. & S. M. Railway Company it was no use filing a suit against them. It was necessary to give notices to the other Companies and as the notices were not given within six months plaintiff cannot recover.

It will, therefore, not be necessary to express an opinion on the first question whether on the facts as found in the judgment the Railway Companies can claim exoneration from liability by virtue of the risk-note, Exhibit B, signed by the consignor.

Costs of the reference will be costs in the case. The Small Cause Court to decide who is to pay the costs. When it is decided then the costs are to be taxed on the scale as on the Original Side of this High Court.

A. I. R. 1922 Bombay 158.

MACLEOD, C.J. AND SHAH, J.

Sholapur Municipality—Defendant-Appellant

v.

Shankar Sheshbhat Ambalji — Plaintiff-Respondent.

S. A. No. 668 of 1920, decided on 4th July, 1921, from a decision of Asst. J., Sholapur in A No. 23 of 1918.

Bombay District Municipal Act (III of 1901), S. 59—Scope—Double house tax—Municipality cannot levy a tax on the building and land on which it stands and again another tax on the land.

In the case of every building or any plot of land yielding or capable of yielding a yearly rent of more than Rs. 10, but not more than Rs. 15 the rate of tax of the Sholapur Municipality is 12 annas per annum. Further rates are given for buildings or lands yielding higher rents, but it is provided that buildings or lands, yielding or capable of yielding a yearly rent not exceeding Rs. 10 should be exempted from the payment of the rate on buildings and lands

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the defendant Municipality, and for an injunction restraining the defendant from levying double house tax for the plaintiff's land.

Held, under the bye-laws passed by the Municipality under Section 59 of the Bombay District Municipal Act, III of 1901, the Municipality may impose a rate on buildings, or lands, or both, situated within the Municipal District, and under the bye-laws, a general rate on buildings and lands on the scale defined therein is recoverable in respect of all buildings and lands which are not the property of Government. The Municipality can levy a rate either on the building or on the land on which the building stands, or it can levy one rate for both building and land. But it cannot levy a rate which would include the rate on building and land and a second rate on the land itself. If an owner of a house has to pay ground rent, he pays that ground rent out of the rent which he receives from his tenants. That rent, therefore, is made up of the ground rent and the return on the capital expended by the owner of the house. Therefore unless it has been made clear that the Municipality were levying from the owners of these various buildings on the plaintiff's land a rate calculated on that part of the hypothetical rental which represented merely the return on the cost of building, it would be presumed that the Municipality were already taxing these particular properties at their full amount. [P. 159, C. 2 : P. 160, C. 1.]

Coyajee and *N. V. Gokhale*—for Appellant.

G. P. Murdeshwar—for Respondent.

Macleod, C. J.:—The plaintiff sued to get a refund of Rs. 52 from the defendant Municipality, and for an injunction restraining the defendant from levying double house-tax for the plaintiff's land bearing Survey Nos. 209 and 210. The suit was dismissed by the Trial Court, but on appeal a decree was passed that the defendant should refund to the plaintiff Rs. 51, and the plaintiff was granted the injunction prayed for.

The facts, which are not disputed, are that the plaintiff is the owner of two Survey Numbers for which he pays assessment to Government. He has let out the lands in those Survey Numbers to 350 tenants who have built their own houses on them, each paying a ground rent to the plaintiff which is less than Rs. 10 a year. The Municipality has assessed the plaintiff for these Survey Numbers on the aggregate rental which he received per annum from all his tenants.

Two questions arise, first, whether the levying of the rate on plaintiff's land was illegal; secondly, whether the rate could be levied on the aggregate rental received from all the tenants, or whether the plaintiff was not entitled to a separate assessment for each plot let out, in which case the rate could not be levied, as each plot was not capable of yielding a rent of Rs. 10 a year. Undoubtedly under the bye-laws passed by the Municipality under Section 59 of the Bombay District Municipal Act, III of 1901, the Municipality may impose a rate on buildings, or lands, or both, situated within the Municipal District, and under the bye-laws, which have not been assailed, a general rate on buildings and lands on the scale defined therein was recoverable in respect of all buildings and lands which were not the property of Government. In the case of every building or any plot of land yielding or capable of yielding a yearly rent of more than Rs. 10, but not more than Rs. 15, the rate is 12 annas per annum. Further rates are given for buildings or lands yielding higher rents, but it is provided that buildings or lands, yielding or capable of yielding a yearly rent not exceeding Rs. 10 should be exempted from the payment of the rate on buildings and lands.

Unfortunately an important question which should have been found for the purpose of this case has altogether escaped the notice of the Courts and the parties, namely, how have the tenements of the various owners, to whom the plaintiff has let out building plots, been assessed? If they have been assessed at the full letting value of the tenements, then that would include the value of the land, and obviously in levying a rate on the full letting value, the Municipality would be levying a rate not only on the buildings but also on the land; but it may safely be presumed that the Municipality have assessed these houses at their full letting value, because that is the only way in which buildings are assessed, and moreover it provides the easiest way for collecting the rate. If an owner of a house has to pay ground rent, he pays that ground rent out of the rent which he receives from his tenants. That rent, therefore, is made up of the ground rent and the return on the capital expended by the owner of the house.

Therefore unless it has been made clear that the Municipality were levying from the owners of these various buildings on the plaintiff's land a rate calculated on that part of the hypothetical rental which represented merely the return on the cost of building, it would be

most probable that the Municipality were already taxing these particular properties at their full amount.

If it were necessary, we would send down the case in order to obtain a finding on this particular question of fact. But on the other question, we think the lower appellate Court came to a right decision. The Municipality can levy a rate either on the building or on the land on which the building stands, or it can levy one rate for both building and land. But it cannot levy a rate which would include the rate on building and land and a second rate on the land itself. It cannot include in the land on which the building stands other lands surrounding that building plot which may belong to the same owner.

We think it is clear from the bye-law that if an existing building is to be taxed separately from the land, then the Municipality can only levy a rate on the plot on which the building stands. It is a different matter if the plot of land is vacant, and the rate is levied on it because it is capable of yielding a rental of more than Rs. 10. Then, if after the land has been rated, a portion of it is let out for building purposes, that portion would be deducted from the whole, and the rate on the land would suffer a proportionate reduction while the plot of land on which the building was erected, with the building, would be rated at the annual letting value of the building and the land. If in this case before the plaintiff had let out his land to these 350 tenants, the Municipality had levied a rate, then no doubt they might continue to levy a rate on the land, and as the plots were let out and the buildings were erected they could levy either the rate on the land according to the number of plots let out, or they might continue the rate on the land and rate the buildings, taking care to see that they did not include in that rate the rate of the land.

But as things are, in this particular case, no rates having been levied on these Survey Numbers before they were let out, it seems to us that the Municipality have been levying a rate on the building and the land in one, and having done that, they cannot levy a separate rate on the land. If they did they would have to do so on each plot underneath each building and not on the whole Survey Numbers. It seems to us, therefore, on these grounds, the appeal should be dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 160.

MACLEOD, C.J. AND SHAH, J.

Nagindas Kapurchand—Plaintiff-Applicant

v.

Maganlal Panachand — Defendant-Opponent.

Civil Extra. Appl. No. 67 of 1921, decided on 5th July, 1921, from a decision of 1st Class Sub-J., Broach, in Small Cause Suit No. 627 of 1920.

Limitation Act, S. 14—Order of return of plaint—Delay in returning plaint—Limitation when begins only on date of actual return.

The plaintiff filed a suit in a Court without jurisdiction and his plaint was ordered to be returned for presentation to the proper Court but was actually returned after five days after the order on which day it was presented to the proper Court which dismissed it on the ground of being without the period of limitation.

Held: the five days of delay must be excluded in computing the period of limitation.

D. R. Manerikar and *S. S. Patkar*—for Applicant.

Macleod, C J.:—We think the Judge was wrong in disallowing the five days which elapsed between the 24th June, and 29th June, on which later date the plaintiff got back his plaint from the first Court. We see no reference in the judgment to the affidavit of the plaintiff that he had asked for the plaint on the 24th June, that he was told that a copy was to be made, and that the plaint would be returned after the copy was made. But in any circumstances a party cannot always get back his plaint on the same day as an order is made that the plaint has been filed in the wrong Court; and as long as the plaintiff has exercised ordinary diligence in pursuing his claim there is no reason why the period up to the day when he gets back his plaint should not be taken into account.

Therefore, in this case, the Rule will be made absolute by directing the lower Court to allow the plaintiff the five days which elapsed between the 24th June and 29th June in getting back the plaint and pass the necessary decree.

Costs in the suit.

Rule made absolute.

A. I. R. 1922 Bombay 161.

MACLEOD, C. J. AND SHAH, J.

Padamsi Narain and another— Appellants

v.

The Collector of Thana—Respondent.

F. A. Nos. 255 of 1918 and 114, 115 and 131 of 1919, decided on 5th April, 1921, from a decision of Asst. Judge, Thana, in Civ. Ref. Nos. 13 and 8 of 1917.

(a) *Land Acquisition Act (I of 1894), Ss. 11 and 12—Award—Proposal by Land Acquisition Officer submitted for approval to Consulting Surveyor is not an award within S. 11.*

A proposal of the amounts to be awarded to the persons whose land is being acquired, drawn up by a Land Acquisition Officer after making the prescribed enquiry and under the instructions for the guidance of Acquiring Officer, submitted for approval to the Consulting Surveyor, does not amount to the making of an award within the meaning of Section 11 of the Land Acquisition Act, and the proposal is not binding upon the Government or the parties interested.

Per *Macleod, C. J.*—The mere signing of a document by an Acquiring Officer, expressing his opinion as to the amount of compensation to be offered to persons whose land is being acquired does not amount to the making of an award within the meaning of Section 11 of the Land Acquisition Act and has no binding effect where the officer himself does not intend the document to be final. Some further formality is required on general principles before it becomes binding on Government and this formality is prescribed by Section 12. [P. 162, C 2.]

Per *Shah, J.*—An award, when made under Section 11 of the Land Acquisition Act, becomes final and conclusive aud although the section makes it obligatory that the award should be filed and this step when taken puts it beyond doubt that the award is made and is final and conclusive, it does not follow that an award can never be final and conclusive unless it is filed. [P. 165, C 1]

(b) *Land Acquisition Act, 1894, Ss. 23, 24, 15 and 11—Land Acquisition Officer has wide scope of inquiry but must make the award as to matters mentioned in S. 11 having regard to Ss. 23 and 24.*

While the Land Acquisition Act gives the Acquiring Officer very wide discretion as to the scope of the inquiry and as to the materials which he may take into consideration, it requires him to make an award as to the matters mentioned in Section 11 and to have regard to the provisions of Sections 23 and 24 in determining the amount of compensation as laid down in Section 15. [P. 166, C. 1; P. 167, C 1.]

(c) *Interpretation of statutes—Marginal notes not relevant.*

The marginal notes could not be used as an aid for the interpretation of the section. [P. 165, C. 2.]

Ratanlal Ranchhoddas — for Appellants.

T. Strangman and *S. S. Patkar*—for Respondent.

Macleod, C. J.:—In 1915 certain lands in the village of Kerol, Taluka Salsette, in the Thana District were notified for acquisition under Act I of 1894, as being required by the Municipality of Bombay for the purpose of a terminal reservoir. One Jacob Bapuji, Deputy Collector in charge of the Salsette Taluka, was directed to take order for the acquisition of the land. He proceeded with his inquiry and on the 22nd March, 1916, the following entry appears in the *roznama*:

"Proceedings returned, award passed and sent for approval to the Consulting Surveyor through the Collector of Thana."

The same day the Deputy Collector wrote to the Consulting Surveyor to Government through the Collector of Thana as follows (Exhibit 28):

"Under Rule 11 (3) of instructions for the guidance of Acquiring Officers I have the honour to submit herewith my proposed award for the land to be acquired for the above purpose for your approval and favour of return."

On the 3rd July, the Consulting Surveyor wrote (Exhibit 29) objecting to the proposed award as excessive, and this was forwarded to Jacob Bapuji by the Collector for explanation before the 10th July. On the 8th July, Jacob Bapuji replied supporting his valuation, but he said:

"I have made my proposal to the best of my ability. A copy of my proposals *has not been filed in the Collector's Office*, nor have they been declared to the parties interested. They can be amended by the Assistant Collector who has now taken my place, if Mr. Miram's estimates are considered correct and the award may be made final by filing a copy in the Collector's Office and declaring it to the parties concerned."

Mr. Cowan proceeded with the inquiry. The *roznama* shows that on the 11th August an award was made and filed, on the 23rd August, it was sent to the Collector for approval, on the 7th September it was made final and declared.

The various Survey Numbers were valued at Rs. 450, 400 and 350 per acre according to their situation. On references to the District Court the claimants contended that Jacob Bapuji had made final awards, that Mr. Cowan was not properly appointed, that he made his awards without an inquiry, based on the opinions of others and, therefore, they

were void.

The Assistant Judge decided that the real and legal award was passed by Mr. Cowan.

The claimants wanted to appeal to the High Court and the Judge was of opinion that the case was not ripe for a preliminary decree. He directed that an order in the form of a declaration on the findings on the points raised should be passed. The claimants then appealed to the High Court on the ground that the Judge had passed a preliminary decree and the appeal was admitted on the 19th December, 1918. Clearly there had been no preliminary decree from which an appeal lay.

However, the Judge proceeded with the hearing of the references with regard to the issue, what extra compensation, if any, should be awarded in addition to that awarded by Mr. Cowan. He came to the conclusion that Rs. 50 per acre should be added to the amounts awarded by Mr. Cowan, that five per cent. should be added for the potentiality of the lands as building lands and five per cent. for the possibility of demands being made for moorum.

There have been three appeals by various claimants from the decision of the Judge, and the question whether Jacob Bapuji had not made a final award arises properly in these appeals. Obviously if the Judge had awarded as much as or more than Jacob Bapuji, this issue would be superfluous.

Section 11 of Act I of 1894 directs that the Collector should proceed to inquire into objections by the persons interested in the land to be acquired and after ascertaining the value of the land make an award under his hand. Section 12 says such award shall be filed in the Collector's Office and shall, except as hereinafter provided, be final and conclusive evidence as between the Collector and the persons interested whether they have respectively appeared before the Collector or not, of the true area and of the value of the land.

It is difficult to see how it could possibly be said that Jacob Bapuji had made an award which was final as between the parties interested and himself, or that he could ever have thought that he had made such an award in the face of his letters of the 22nd March, and the 8th July, though it does appear that he gave instructions in April to the *Mamlatdar* to hand over possession of the land to the Municipality.

That, of course, could have nothing to do with the question, whether as a matter of fact the award had been made. It may be as well to point out that the Courts are not concerned with the instructions given by Government to its officers with regard to their proceedings under Sections 11 and 12 of the Act. If Jacob Bapuji in spite of the general instructions had made his award without consulting the Surveyor to Government through his superior officer the Collector, the question might have arisen whether it was binding on Government before it was filed. But the mere signing of a document by the Acquiring Officer expressing his opinion as to the amount of compensation to be offered cannot have any binding effect when the officer himself writes that it is not intended to be final.

I do not think, therefore, that Jacob Bapuji made his award within the meaning of Section 11. I do not attach any importance to the note added afterwards by Jacob Bapuji to the document he had signed on the 22nd March, it only bears out what he had written to the Consulting Surveyor on the same day.

But the appellants' arguments must go so far as this, that if the Acquiring Officer once signs a document in the nature of an award, it is conclusive. He cannot change his mind, nor if he died and the document was found amongst his papers could Government dispute it. But, in my opinion, some further formality is required on general principles before it becomes binding on Government, and this formality is prescribed by Section 12. It must be filed and so become a part of the office records, and then it shall be final and conclusive evidence between Government and the parties interested.

No doubt the wording of Section 12 is not very satisfactory and from the *roznama* in the case it does not appear that, even as it stands, it was properly understood by Mr. Cowan. For, although the award is stated to have been filed on the 11th August, it was thereafter sent to the Collector for approval and

only made final and declared on the 7th September, 1916. If an alteration decreasing the amount of compensation had been made after the 11th August, I do not think it would have been valid. At the same time considering that an award made under Section 11 is an offer, by Government to the person interested in the land to be acquired, of the compensation to be paid, it should be made clear exactly what formality should be observed to make it a binding offer.

In ordinary transactions an offer is not binding on the party making it, until it is published or communicated to the party for whom it is intended and as the amendment of the Act is now under consideration, it is desirable that this question which is constantly arising in one form or another in references to the Court under Section 18 should be settled by the Legislature.

The appellants did not rely upon *Dossabhai Bezanji* v. *Special Officer, Salsette Building Sites* (1), where the only question was whether the award which had been filed and promulgated was a valid award under the Act. If Jacob Bapuji had continued as Acquiring Officer and on receiving the opinion of the Consulting Surveyor had made his award in this form: "I think the proper amount of compensation to be awarded is X rupees but as the Consulting Surveyor thinks it should be X *minus* Y rupees, I award X *minus* Y rupees," then no doubt that decision would have been in point.

Kooverbai v. *Assistant Collector, Surat* (2) seems to me directly in point and I have no wish to alter anything I said in my judgment in that case.

It is really a question of fact whether Jacob Bapuji made this award and when he wrote on the 22nd March that the document was the award he proposed to make, I cannot see how it can be said that he had made it.

The next question is whether the compensation awarded by the Assistant Judge should be increased. The land is described as follows in his judgment.

"The land under reference is triangular in shape with a short base at the south running to an acute angle which is the top of a hill, with hill sides falling from the ranges of hill rapidly to a valley which is equidistant from either side. At the same time there is a general fall from north to south. At the apex of the hill the height of the hill is about 850 feet above the sea level. The Agra Road is about 135 feet above the sea level. The southernmost portion of the land is 180 feet above sea level. The nearest of the plots is about 1,000 yards from the Agra Road and 2,500 yards from Ghatkopar Railway Station."

It is difficult to imagine how any one could consider that such land had any potentiality for building land. Round about the station a considerable number of houses had been erected after plague broke out in Bombay in 1896-97, but there was no evidence that many houses had been erected in recent years while there was a very large quantity of land available on or near the Agra Road. It was suggested that a plot numbered 27 measuring one acre on the map, close to the southern portion of the land in reference, had been sold at seven annas per square yard, but that estimate is absolutely fallacious, as plot No. 27 was sold with plots Nos. 33 and 42 totalling altogether 11,858 square yards and plots Nos. 33 and 42 were far better situated than plot No.27. No contour map has been produced but from the above description of the land in reference it is clear that apart from the difficulty of getting access to the Agra Road the costs of levelling a building site would be prohibitive for that locality.

In my opinion therefore, the land could only be valued on the basis of what would be realised for the grass growing on it. On the evidence with regard to this it is impossible to say that the decision of the Assistant Judge does not award sufficient compensation, while he has added ten per cent. for potentialities which can only be considered as of a very remote character.

In my opinion all the appeals should be dismissed with costs.

Shah, J. :—These appeals arise out of proceedings under the Land Acquisition Act in respect of lands acquired for the terminal service reservoir at Kerol in

(1) (1912) 36 B. 599 = 14 Bom. L.R. 592=16 I. C. 549.
(2) (1920) 22 Bom. L. R. 1136=59 I.C. 429.

the Thana District for the Bombay Municipality under a declaration of the 17th May, 1915.

The Assistant or Deputy Collector in charge of the Bassein Taluka was appointed under the Lands Acquisition Act to take order for the acquisition of the land under the Government Resolution of that date. Mr. Jacob Bapuji was then in charge of the Bassein Taluka as Deputy Collector, who started proceedings under the Act with a view to make his award.

After making the inquiry contemplated by the Act he prepared his award on the 22nd March, 1916, and in accordance with certain departmental instructions contained in the Government Resolution No. 6355 of 1909 as amended by Government Resolution No. 7487 of 1910, submitted his award to the Consulting Surveyor to Government through the Collector of Thana. Thereafter the District Deputy Collector wrote to the Municipal authorities to take possession of the lands, and possession was in fact taken about the middle of April, 1916. The Deputy Collector was then transferred and he delivered over charge of the Salsette Taluka on the 29th April, 1916.

The Consulting Surveyor did not agree with the conclusions recorded by the Deputy Collector, as would appear from his letter of the 3rd July, 1916 to the District Deputy Collector and suggested a much lower valuation. The District Deputy Collector, who had submitted his award, gave an explanation as required by the Collector, in which he stated that he had made his proposals to the best of his ability and suggested what appeared to him to be the proper procedure according to law as he understood it. He wrote then that his proposals had not been filed in the Collector's office nor had they been declared to the parties concerned. He thought that they could be corrected by the Assistant Collector in charge of the Bessein Prant, if the Consulting Surveyor's valuation was considered correct. He referred to a note which, he states in his evidence, was added by him to his award then (*i.e.*, 8th July, 1916) and which was to the following effect: "These proposals of award are provisional and subject to approval. They are not declared and are not final." This postscript bears no date, but I accept it on his evidence as having been made in July, 1916.

The Assistant Collector resumed the proceedings in August, 1916. He made an award in accordance with the valuation of the Consulting Surveyor and sent it to the Collector in accordance with the departmental instructions already referred to. The Collector pointed out a small mistake; and he amended his award accordingly, and ultimately made it final and declared it on the 7th September, 1916.

The appellants before us and others asked for references to the District Court under Section 18 of the Land Acquisition Act. The Assistant Judge of Thana ultimately made his award on the 23rd December, 1918, after hearing the parties and considering the evidence.

A preliminary objection was taken before him that the award which was final and conclusive was the award made by the Deputy Collector on the 22nd March, 1916, and not the one made by the Assistant Collector, Mr. Cowan, on the 7th September, 1916. Several issues were raised in connection with the preliminary objection, but he held on the 26th August, 1918, that the final award in the case was that made by the Assistant Collector.

The Assistant Judge practically upheld the valuation of the Consulting Surveyor subject to a small variation. In the appeals before us it is urged that the award made by the District Deputy Collector on the 22nd March, 1916, was final and conclusive and that the claimants ought to be allowed compensation for the lands on that basis. It is also urged that on the evidence the true market value is that determined by the District Deputy Collector.

On the evidence I see no reason to hold, that the conclusion reached by the Assistant Judge as to the market value of the lands in question is wrong; and on the merits no case is made out for disturbing the award of the lower Court. The only point that requires consideration is whether the award prepared by the District Deputy Collector was made by him within the meaning of Section 11, and whether it was final and conclusive as provided in Section 12. If it was, the appellants are entitled to compensation according to that award, and

if it was not, these appeals must be dismissed.

The questions that arise with reference to the award of the 22nd March, 1916, by the Deputy Collector present some difficulty to my mind, in view of the decisions in *Dossabhai Bezanji* v. *The Special Officer, Salsette Building Sites* (1) and *Kooverbai* v. *The Assistant Collector, Surat* (2).

I propose to deal with the question as to the interpretation of Section 12 first. After providing for an inquiry and an award by the Collector in Sections 9, 10 and 11, it is provided in Section 12 that the award shall be filed in the Collector's office and shall be final and conclusive as between the Collector and the persons interested of the true area and value of the land and the apportionment of the compensation among persons interested, except as provided in the Act. In the present case we are not concerned with the saving clause "except as hereinafter provided." If the award made on 22nd March, 1916 had been filed, it is conceded that it would have been final and conclusive as to the value of the land, whatever the departmental instructions to the contrary might be. But it is contended that the filing is a condition precedent to its being final and conclusive. I am unable to accept this contention.

The award when made under Section 11 would be final and conclusive. When it is filed in the Acquiring Officer's office, there can be no doubt that the award is made. But it is difficult to hold that an award made under Section 11 cannot be final and conclusive unless and until it is filed. The section provides that such award shall be filed and shall be final and conclusive as to certain matters. I do not see any sufficient ground in the wording of the section for holding that the filing of the award is absolutely essential to its being final and conclusive.

I agree that the filing is obligatory under the Act, also that the step, when taken, puts it beyond doubt, that the award is made and that it is final and conclusive as provided in the section. But I am unable to agree that it can never be final and conclusive unless it is filed. The section would have been worded in a different way if that had been the intention of the Legislature. The important thing is the making of the award, as provided in Section 11, and the filing is a ministerial act. I am unable to attach such significance to the filing of the award as is suggested on behalf of the respondent.

The marginal note of Section 12 is apt to suggest that the award would be final and conclusive when filed. I do not think that the marginal note could be properly used as an aid for interpreting the section. Even if it were so used, I do not think that it can justify the construction that the "filing" of the award is an essential step to be taken to make the award final and conclusive as to the matters mentioned in Section 12. I am of opinion that when the award is made under Section 11, the consequence mentioned in Section 12 as to its being final and conclusive necessarily follows.

The important question, therefore, to my mind is whether the award was made by the Deputy Collector on the 22nd March. Ordinarily there should be no difficulty in determining whether the award is made or not. But the difficulty arises in consequence of the departmental instructions and the procedure that the Awarding Officer finds it necessary to follow.

With regard to these instructions which have been published at pages 273-279 of Campbell's Law of Land Acquisition, I may add that they have not the force of law, which rules made under Section 55 of the Act would have. They are not rules made under that section; and it is not suggested that there are any rules under that section.

I accept the propositions laid down in *Ezra* v. *Secretary of State for India* (3) that the proceedings before the Collector are administrative and not judicial, that the Awarding Officer's duty is not to conclude the owner by his so-called award, but to fix the sum which in his best judgment is the value and should be offered, that the Collector is not limited to the evidence before him, and that it is open to him to take into consideration the information in the hands of the department The Collector's discretion in the matter

(3) (1905) 32 C 605=32 I A. 93=7 Bom. L R. 422=9 C. W. N. 454=1 C. L J. 227=2 A.L.J 771=8 Sar. P.C. 779 (P.C.).

is unfettered in law as regards availing himself of such information in the hands of the department. At the same time it seems to me that under the Act as well as the decisions, it is his duty to fix a sum which in his judgment represents the market value of the land. Section 15 makes it clear that he shall be guided by the provisions of Sections 23 and 24 of the Act in determining the amount of compensation.

It will be convenient to state briefly the facts which have been referred to in the argument as bearing on the question, as to whether the award of the Deputy Collector is final and conclusive. The Deputy Collector prepared an award on the 22nd March, and sent it on to the Consulting Surveyor through the Collector. He made the following entry in the notes of proceedings relating to the acquisition:—"award passed and sent for approval to the Consulting Surveyor through the Collector of Thana."

The award in form is a complete document in accordance with the requirements of the Act, and on its face it is an award made under Section 11 after making the inquiry contemplated by the Act (see Exhibit 27). On the same day he wrote a letter to the Consultiug Surveyor, with which he sent his proposed award and other papers, in these terms :—

" Under Rule 11 of instructions for the guidance of Acquiring Officers I have the honour to submit herewith my proposed award for the land to be acquired for your approval and favour of return."

No intimation was given to the claimants as required by Section 12, sub-Section (2). A few days later the Deputy Collector wrote on the 31st March, to the Hydraulic Engineer informing him, that the award had already been made and sent for approval to the Consulting Surveyor of Government, and reminded him of the request which he had already made to fix a date to take possession of the land (see Exhibit 19).

Two days before this, the same officer writing on behalf of the Collector of Thana, had informed him that the District Deputy Collector had completed the acquisition proceedings, and proposed an award and had sent it to the Consulting Surveyor, and that the *Mamlatdar* had been instructed to hand over possession to the Bombay Municipality (see Exhibit 32). I have already referred to the fact that the possession of the land was taken in April.

In July the Consulting Surveyor disapproved of the award of the Deputy Collector, who, when called upon to submit an explanation, said that he had made his proposals to the best of his ability and pointed out a way which he thought was open to the Collector according to law. He also added a footnote to the award, to which I have already referred. Thereafter the Assistant Collector resumed the proceedings and made his award on the 11th August, 1916, in which he accepted the valuation of the lands by the Consulting Surveyor to Government, and made the following note in the diary of the proceedings : " award made and filed. " He then sent it to the Collector for approval, who approved of it subject to a slight alteration (see Exhibit 43). The alteration was accepted by the Assistant Collector on the 7th September, 1916, and the award was then made final and declared.

These facts clearly show that the departmental instructions practically leave nothing to the judgment of the Awarding Officer, who has to make his award under Section 11 of the Act. These instructions ignore the individuality and the statutory obligations of the Acquiring Officer. It is provided in the instructions that " in all cases where a reference to the Collector is made the Acquiring Officer should make his final award according to the instructions from the Collector."

These instructions, I think, go far beyond what is laid down in *Ezra's case* (3). That is the view taken in *Dossabhai's case* (1). Batchelor, J.'s judgment is clear on the point, and Heaton, J.'s observations at the end of his judgment point to the same conclusion. Referring to *Ezra's case* (3) he says as follows (page 60) :—"But if, and this seems to me very doubtful indeed, that judgment goes the length of saying that the Special Collector should set aside his own opinion and his own conscience and substitute for it an estimate made by somebody else, then I should find the very greatest difficulty in following that conclusion." My own reading of the provisions of the Act and the judgment of their Lordships of the Privy Council

in *Ezra's case* (3) lead me to the conclusion that while the Act gives the Acquiring Officer very wide discretion as to the scope of the inquiry and as to the materials which he may take into consideration, it requires him to make an award as to the matters mentioned in Section 11, and to have regard to the provisions of Sections 23 and 24 in determining the amount of compensation as laid down in Section 15.

I have carefully considered the *ratio decidendi* in *Kooverbai's case* (2). While I recognise that the special facts of the case afford a basis for distinguishing it from *Dossabhai's case* (1), I think that there is a certain degree of conflict in the reasoning underlying these decisions. I have, therefore, stated my own view as to the meaning of the sections of the Act and as to the effect of the departmental instructions.

Though I have stated the various circumstances which have been referred to in the argument, I do not think that they necessarily help us in determining whether the award was made by the Deputy Collector in March, 1916. What the Deputy Collector himself said or did in July does not seem to me to affect the question. The omission to file the award as required by Section 12 (1) and to give notice to the parties under Section 12 (2) suggests one inference, while the taking of possession soon after the 'proposed' award suggests the contrary inference. On the one hand it seems that so far as the Deputy Collector was concerned the award contained the valuation, which in his judgment was correct: on the other hand it appears that at the time he merely proposed it as required by the instructions and that he did not 'make' it.

It is not necessary for the purpose of these appeals to determine whether the second award made by the Assistant Collector really represents his opinion as to the market value of the property. But that award refers to the award of the 22nd March as a 'provisional award.' In a sense this circumstance brings the present case nearer the facts in *Dossabhai's case* (1) than *Kooverbai's case* (2). Lastly, there is the entry in the diary of proceedings that the award was 'passed' and sent for approval to the Consulting Surveyor, and there is the Awarding Officer's letter of the same date to that Officer. We have also the fact that the award purports to be a complete document such as is contemplated by Section 11. These facts also suggest conflicting inferences. I must say that I have felt great difficulty in this case in deciding whether the Deputy Collector *made* his award on the 22nd March or not. On the whole, I have come to the conclusion, though not without hesitation that it is not established on the special facts of this case that the Awarding Officer made his award on the 22nd March. Therefore, the only award in the case, such as it is, is the award which purports to have been made by the Assistant Collector. At the same time I desire to make it clear that to my mind it does not necessarily follow that an Acquiring Officer does not make his award, simply because he sends it to the Collector or to any other officer for approval. For instance in the present case the award was made by the Assistant Collector on the 11th August, even though it was sent afterwards to the Collector for approval.

I, therefore, agree that the appeals may be dismissed.

I may add that the difficulty arising from the departmental instructions is real. In my opinion the whole position requires to be considered, with a view to make it clear beyond controversy as far as possible, either by adequate rules under Section 55 of the Act or by a suitable amendment of the Act as to what should constitute the making of the award, and what definite step, if any, should make the award final and conclusive of the matters mentioned in Section 12 of the Act.

Appeals dismissed.

A. I. R. 1922 Bombay 167.

MACLEOD, C. J. AND SHAH, J.

T. S. Machado—Accused-Appellant

v.

Emperor—Opposite-party.

Cr. App. No. 493 of 1921, decided on 21st September, 1921, from conviction and sentence passed by Ag. Ch. Pr. Mg., Bombay.

Native Passenger Ships Act (X of 1887), Ss. 31, 9, and 10—Certificate 'A'—Voyage from Bombay to Goa and back is one voyage.

The accused who plied a steamer between Bombay and Goa for conveyance of passengers had certificate 'A' as required by Sections 9 and 10 of the Native Passenger Ships Act, 1887, which expired on the night of 31st May, 1921. The steamer left Bom-

bay with passengers on the 31st May, 1921 for Goa and returned to Bombay on the 2nd June, 1921. The accused was charged under Section 31 with the offence of sailing a ship without a certificate:

Held: The accused had committed no offence, for the voyage from Bombay to Goa and back was really one voyage. [P. 168, C 2]

P. N. Godinho—for Accused.

Bahadurji and *Bowen*—for the Crown.

Macleod, C. J.:—The accused in this case is the owner of the steamer San Francisco Xavier which left Bombay for Goa on the 31st May, 1921 in charge of her Master. At the time of sailing she had certificate "A" as required under Sections 9 and 10 of the Native Passenger Ships Act, X of 1887.

Section 9 says:

"A ship intended to carry passengers shall not commence a voyage from a port or place appointed under this Act, unless the master holds two certificates to the effect mentioned in the two next following sections."

Section 10 says:

"The first of the certificates (hereinafter called 'certificate W') shall state that the ship is sea-worthy and properly equipped, fitted and ventilated and the number of passengers which she is capable of carrying."

We are not concerned in this case with certificate "B" as that was not required when this particular voyage was commenced under the rules.

The term "voyage" is defined in Section 5, Clause (5), as meaning, when used without the prefix "long" or "short," the whole distance between the ship's port or place of departure and her final port or place of arrival.

The certificate carried by this vessel expired a few hours after the ship had left the port. The ship arrived at Goa and returned after a few hour's stay to Bombay, arriving on the 2nd June, 1921. Unfortunately it is not very clear what was the charge on which the accused was convicted by the learned Chief Presidency Magistrate, or what was the voyage which the ship commenced without holding the certificate 'A.' It cannot be the voyage from Goa as Goa is not a port or place appointed under the Act. Even assuming it was a port appointed under the Act within British India, considering the nature of the trade carried on by this steamer, sailing from Bombay, calling at coast ports, and stopping a short time at each port and then returning, it cannot be said that the outward voyage from the ship's port or place of departure was one voyage, and the return voyage from the furthest port reached a second voyage The ship continues on her voyage the whole time, and in such a case the final port must be the port of original departure.

No doubt the rules provided by the Act were intended for the safety of passengers, and certificate 'A' which expired on the 31st May, was one granted for the six months of fair weather. The certificate 'A' which would be granted on the 1st June would necessarily be of a different character, and if it is desired that, in order to secure the safety of the passengers, a ship leaving at the end of May should also hold a rough weather certificate if the ship does not return during May, then that must be provided for by an Act. It seems curious that the learned Magistrate has not noticed in convicting the accused under Section 9, taken with Section 31, that it is nowhere stated from what port the ship commenced the voyage without a certificate. That would be in itself sufficient to vitiate the conviction.

But in any event I am of opinion that on the facts of this case the voyage from Bombay to Goa and back was one voyage. I think, therefore, that the conviction was wrong and it must be quashed, and if the fine has been recovered it must be refunded.

Shah, J.:—I agree.

Conviction and sentence reversed.

A. I. R. 1922 Bombay 168.

MACLEOD, C. J. AND SHAH, J.

Narayan Laxman Agharkar and others—Appellants

v.

Chapsi Dosa and others—Respondents.

F. A. No. 278 of 1920, decided on 30th August, 1921, from a decision of 1st Class Sub-J., Thana, in Suit No. 202 of 1916.

(a) *Limitation*—Khatas — *Several* Khatas *between the same parties—Accounts in all of them taken in 1913—Suit on accounts with time from that date is not barred.*

However many accounts may be opened regarding transactions between two parties they must be treated as one account for the purposes of limitation. Where three *Khatas*

(accounts) were operated upon up till 1908 and the business transactions between the parties continued after 1908, and were recorded in the remaining two *Khatas* and accounts were taken in 1913, the total effect was that what was due to the plaintiffs was the balance on the five accounts. [P. 169, C. 2.]

(b) *Dekkhan Agriculturists' Relief Act (XVII of 1879), S. 13—Suit on trading transactions against agriculturists—Account must be taken under the Act.*

It appears inequitable but it is the law, that if the defendants are *agriculturists*, the accounts even though they relate to trading transactions must be taken under Dekkhan Agriculturists' Relief Act [P. 169, C. 2.]

P. B. Shingne—for Appellants.

G. S. Mulgaonkar—for Respondents.

Macleod, C. J.:—The plaintiffs sued to recover Rs. 5,407-11-7 as principal and Rs. 248-12-0 as interest from the 1st and 2nd defendants. The 1st and 2nd defendants and one Ramchandra, brother of the 1st defendant, were a joint Hindu family carrying on business in groceries, and in the course of that business had dealings with the plaintiffs. There were various *Khatas* five in all, representing the transactions between the parties. Before 1913 Ramchandra separated, but the business was carried on by the 1st and 2nd defendants. In August, 1913, the amounts to the debit and credit of the various five *Khatas* were totalled, credits on one side and debits on the other, and the 2nd defendant signed both the debits and credits as correct. Thereafter the account continued, and this suit is brought within three years of the signatures placed by the 2nd defendant in the plaintiffs' books on the 8th August, 1913.

The 1st defendant is now dead and the 2nd defendant disputes the plaintiffs' claim which was allowed by the Court below. The decree directs the 2nd defendant personally and as representative of the deceased defendant No. 1, to pay to the plaintiffs Rs. 5,273-15-0 and proportionate costs with further interest at six per cent. The first question taken in appeal is a question of limitation. It was argued that three of the *Khatas*, which were amalgamated in 1913, had not been operated upon since 1908, and therefore, any acknowledgment of what was due by the defendants to the plaintiffs on these *Khatas* was barred by limitation. That is an ingenious but a dishonest defence, because it is clear that the business transactions between the parties continued after 1908, and were recorded in *Khatas* Nos. 4 and 5, and the total effect was that what was due to the plaintiffs was the balance on the five accounts, and it was not open to the defendants to say that the amounts appearing to be due by them on the first three *Khatas* were barred, while the amounts which were due to them from the plaintiffs on the latter account were not barred. Obviously, however many accounts might be opened recording the transactions between A and B, they must be treated as one account for the purposes of limitation.

Then it is not necessary to deal with the question, which is still open, whether an acknowledgment, given after the period of limitation has expired, is sufficient to form the basis for a new action on the ground that it implies a promise to pay. In *Chunilal* v. *Laxman Govind* (1), we held that a Rujukhata would form the basis of a fresh action. But in that case the Rujukhata was within the period of limitation and it may be said that we would be going further, if we hold that even if it is signed after the period of limitation, it would still afford the basis for a fresh action. But unfortunately the learned Judge has fallen into an error in refusing to take the account according to Section 13 of the Dekkhan Agriculturists' Relief Act.

We feel considerable sympathy with him because it has always appeared to us inequitable that a trader should be entitled to the advantages of the Act because he happens, in conjunction with his trading transactions, to carry on agricultural business, so that, if the income from agriculture is more than the income from his trading transactions, he can ask to have the accounts of trading transactions taken under the Dekkhan Agriculturists' Relief Act. That is the law, and, as the defendants are agriculturists, these accounts, though recording trading transactions, should be taken according to the Act.

The case must, therefore, go back to the Subordinate Judge for an account to be taken of all the five *Khatas* under Section 13 of the Dekkhan Agriculturists' Relief Act, and the result must be certified to us within three months. *Case remanded.*

(1) A. I. R. 1922 Bom. 183=46 Bom. 24.

A.I.R. 1922 Bombay 169.

MACLEOD, C. J. AND SHAH, J.

Abdul Rehman Ismail—Accused-Appellant

v.

Emperor—Respondent.

Cr. Appeal No. 473 of 1921, decided on 12th September, 1921, from conviction and sentence passed by 4th Pre. Mag., Bombay.

Reformatory Schools Act (VIII of 1897)—Adult and Juvenile convicted—Former given one year's imprisonment—Latter's punishment should not exceed it.

Of two accused found guilty of the offence of theft, one, a boy of 16, was ordered to be detained for two years under rigorous imprisonment in the Juvenile Prison at Dharwar. But the other, an adult with three previous convictions, was sentenced to rigorous imprisonment for one year.

Held: The sentence passed on the juvenile offender should not exceed the sentence passed on the other accused. [P. 170, C. 2.]

No one appeared on either side.

Macleod, C. J.:—If the second accused is sentenced to be detained under rigorous imprisonment in the Juvenile Prison at Dharwar for two years as he is a lad of 16, and the first accused who is an adult, although he admittedly has three previous convictions, is sentenced to one year's rigorous imprisonment, it follows that the Magistrate gave the 2nd accused a longer sentence because he considered that it would be for his benefit to remain within the walls of the Dharwar Institution for two years. It is nowhere laid down that a Magistrate has such powers to increase the sentence of imprisonment on this ground. However desirable, it might be for the Magistrate to have such powers, the sentence is one under the Indian Penal Code, but, as the rules with regard to the detention of a juvenile in the Dharwar Jail provide, that no one should be admitted into the Jail unless he has been sentenced to a period of one year or upwards, the result is, that in the case of juveniles Magistrates increase the sentences in many cases up to one year, so as to enable them to be sent to the Dharwar Jail instead of to the ordinary Jail, and to that extent we might overlook the fact that they increase the sentences on juveniles beyond what the sentences would amount to in the case of adults, in order that juveniles should get the advantage of being detained in the Juvenile Prison.

We doubt very much whether they are entitled to go beyond that, and to sentence a juvenile to a period, as in this case of two years, merely because, they think that such detention will be to the benefit of the accused.

We have to consider in the first instance the offence committed. Clearly, since the first accused, who not only was an adult but also had been previously convicted, only got one year's rigorous imprisonment; the second accused would, in the ordinary course, have been sentenced to less than one year.

For these reasons we think the sentence must be reduced to one year.

Shah, J:—I agree

Sentence reduced.

A. I. R. 1922 Bombay 170.

MACLEOD, C. J. AND SHAH, J.

Narsinha Gopal and another—Judgment-Debtors-Appellants

v.

Balwant Madhav Vadgaonkar—Decree-holder-Respondent.

S. A. No. 294 of 1921, decided on 3rd October, 1921, from decision of Dist. J., Sholapur, in A. No. 266 of 1920.

Decree—Instalment—Failure to pay—Default clause—Court has wide powers to relieve party from consequences of default—Equity.

The amount due under a decree was to be paid in instalments. On failure to pay two instalments, the whole amount then due could be recovered by sale of certain property over which a charge was created. The first instalment was paid when the second became due. The judgment-debtor applied to the Court for extension of time for the payment of second instalment, and on the dismissal of the application, the amount of the second instalment was paid into the Court. In the meantime, the third instalment became due. The decree-holder did not accept the payment of the second instalment and applied to the Court to recover the balance due by sale of the property:

Held: As a Court of equity the High Court had wide powers to do what seemed to it just. There is no injustice in putting the decree-holder exactly in the same position as if no default has been committed because the decree-holder has the security of the property for the balance of the decretal amount, and interest was running on that amount. [P. 171, Cs. 1, 2.]

C. H. Patwardhan—for Appellant.

G. P. Murdeshwar—for Respondent.

Macleod, C. J.:—This is an appeal against the decision of the District Judge of Sholapur upholding the order of the Subordinate Judge, directing that the Darkhast, taken out by the plaintiff should proceed.

The parties were partners in a bank-

ing shop which was not successful and so the partnership account had been made up and a balance was found due against the defendants. The plaintiff filed a suit No. 51 of 1915, on his partnership claim and decree was passed in his favour on an award. The decree was passed on the 22nd February, 1917, directing that the decretal amount should be paid in eight equal instalments of Rs. 371-9-4 and interest according to the balance due at the time when any one instalment was paid. The decree also directed that in default of payment of any two instalments, the plaintiff should recover the whole amount then due by the sale of the property mentioned through the Court.

It appears that in the plaint the plaintiff asked for a charge in respect of the amount due on certain immoveable property, although it is difficult to see what was the basis of the claim. However, he got a declaration in the decree that he was entitled to that charge.

There can be no doubt that the defendants got into arrears before paying the first instalment which fell due on 10th May, 1918. It was not paid until 19th April, 1919. The second instalment which was due on 30th April, 1919, and the third instalment which was due on the 18th April, 1920, were not paid. The defendants having made no further payments were in default of two instalments. Before 18th April, 1920, they asked the Court to extend the time. That application was not heard until June, 1920, when it was rejected. Then the defendants made payment of the second instalment which ought to have been paid on the 30th April, 1919, and, on the 6th May, 1921, they paid the instalment which ought to have been paid on the 18th April, 1920.

Therefore, the defendants cannot escape the consequences of their default except by appealing to our sense of equity.

From the record we cannot say whether the default was due to circumstances beyond their control or whether it was due to their culpable neglect in not making payment within due time of the first instalment. But we cannot agree with the argument of the plaintiff that in cases of default, we have no power whatever to relieve a party from the consequences of his default. As a Court of Equity we have wide powers to do what seems to us just. There is no injustice in putting the plaintiff exactly in the same position as if no default had been committed. The plaintiff has the security of the property for the balance of the decretal amount and interest is running on that amount. Therefore he loses nothing of what he would have got if the defendants had done what they had been ordered to do. We, therefore, allow the appeal on these terms :—

The defendants should pay the costs of the Darkhast throughout and the instalment, including interest, which fell due in April or May, 1920, within two months from the time the proceedings reach the lower Court. In default of payment the Darkhast should proceed.

Appeal allowed.

A I.R. 1922 Bombay 171.

MACLEOD, C. J. AND SHAH, J.

Bai Metherbai Nanbhai Banaji—Plaintiff-Applicant

v.

Mrs. P. R. Dadina — Defendant-Opponent.

C. Application No. 553 of 1921, decided on 22nd August, 1921.

Bombay Pleaders' Act (XVII of 1920)—Suit by landlord to eject tenant—Pleader's fee must be calculated on actual value of property and not the value for Court fees—Court Fees Act, S. 7 (IX) (cc)*—Legal Practitioner.*

In a suit to eject the defendant, plaintiff's tenant, from her house, the claim for purposes of Court-fee was valued at Rs. 1,080 (the amount of rent for one year) and for purposes of jurisdiction it was valued at Rs 15,000, the value of the house. The suit being decreed in the trial Court the defendant appealed to the High Court, valuing her claim at Rs. 1,080 both for Court-fee purposes and for pleader's fees but failed in appeal. A question having arisen how the pleader's fees should be assessed.

Held, the pleader's fees should be assessed on the value of the house. [P, 172, C. 1.]

G. N. Thakore—for Applicant.

J. G. Rele—for Opponent.

Macleod, C. J. :—This was a suit by a landlord to eject a tenant from a house occupied by the tenant. It was, therefore, a suit for possession of a house and but for the amendment of the Court Fees Act in 1905, the Court-fees would have been payable on the value of the house. Consequently the value of the house would decide the jurisdiction and it would follow that the

pleader's fees would be payable on the value of the house.

Now that in a suit for recovery of immoveable property from a tenant the Court-fees are payable according to the amount of rent of the property in the suit payable for the year next before the date of the presentation of the plaint, it follows that the Court fees are payable only on the amount of the annual rent, and the amount of the annual rent would decide also the question of jurisdiction. But it does not necessarily follow that the pleader's fees which were payable under the Act which was in force when this suit was filed, would not be fixed according to the decision in *Bai Meherbai* v. *Maganchand* (1) by the value of the house. It cannot be disputed that the subject-matter in dispute was the house and it is difficult to separate possession of the house and the house itself unless a distinction is made specifically by rule.

Therefore, we think that the decision of the Taxing Officer is wrong and that the pleader's fees must be calculated on the amount at which the claim was valued when the suit was filed for the purpose of jurisdiction, which was practically recognised as correct by the appellant-defendant when the first appeal was presented to this Court. It may be a matter for future consideration whether the Third Schedule to the Bombay Pleaders Act, XVII of 1920 should not be altered so as to provide for the calculation of pleader's fees in suits by landlords against tenants for immediate possession of the immoveable property in the tenant's occupation.

Shah, J. :—I agree.

Decision of Taxing Officer set aside.

(1) (1904) 29 Bom. 229=7 Bom. L. R. 131.

A. I. R. 1922 Bombay, 172.

MACLEOD, C. J. AND COYAJEE, J.

Anna Narayan Pavgi—Plaintiff-Appellant

v.

Madhyama Sthititila Paraspara and Co. Mandall and others—Defendants-Respondents.

S. A. No. 694 of 1920, decided on 12th January, 1922, from the decision of Dist. J., Poona in A. No. 60 of 1919.

Court Fees Act, Art. 1, Sch. II, Art. 17—Decree against one defendant only—Appeal for decree against others also—Court-fee must be paid on amount for which they are sought to be made liable.

Where plaintiff, who having sued several defendants on a money-claim obtained a decree against one of them, appealed to get a decree against the remaining defendants and valued his claim in appeal as one for declaration :

Held: The plaintiff was bound to pay Court-fee on the amount for which the remaining defendants were sought to be made liable.

[P. 173, C. 1.]

G. N. Thakor and *D C. Virkar*—for Appellant.

G. B. Chitale, N. V. Gokhale, D. A. Tuljapurkar, K. V. Joshi, P. B. Shingne and *S. Y. Abhyankar*—for Respondents.

Macleod, C. J.:—The plaintiff filed this suit against ten defendants to recover a sum of Rs. 4,617-4-0. A decree was passed against the first defendant only by the trial Court, and an appeal against that decree was dismissed by the District Judge. The plaintiff has now filed a second appeal against that decree, and claims to value his appeal as if he was suing merely for a declaration, namely, that the decree passed by the trial Court was binding against the other defendants also. This contention seems to have found favour with the Taxing Officer, who relied upon the decision in *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (1), which has nothing whatever to do with the point raised by the appellant in this case. There the suit was filed originally for a declaration that a certain decree was ineffectual and inoperative against the plaintiffs.

In this case there is a money suit against a large number of defendants and the plaintiff, having only got a decree against one of them, seeks to get a decree against the remaining defendants. The only order, therefore, that this Court could pass, if the appellant is successful, would be that the remaining defendants should pay the amount claimed to the plaintiff.

The same question came up for decision before the High Court of Madras in *Ramasami* v. *Subhusami* (2). There the suit was filed upon a hypothecation bond executed by the first defendant. The son adopted by the deceased husband of the first defendant was made a party, and he claimed that the debt was not binding on him. The first Court passed a decree against both the defendants.

In appeal, the second defendant was exonerated. The plaintiff preferred a second appeal against the second defendant as sole respondent and affixed to the memorandum of

(1) (1903) 30 Cal. 788.
(2) (1890) 13 Mad. 508.

appeal a ten rupees stamp as if a declaratory decree was sought. The judgment was as follows:—

"The appeal is substantially to establish the plaintiffs' right to render the hypothecated property belonging to the second defendant, liable to be sold in satisfaction of the debt claimed in the suit. The Court-fees payable must, therefore, be calculated on this amount."

It is, therefore, clear that the decision of the Taxing Officer was wrong, and the appellant cannot, by saying that he is asking for a declaration that the decree passed against the first defendants is binding against the other defendants, get rid of the fact that he is asking this Court to pass a money-decree against the other defendants. The appeal, therefore, has been wrongly valued, and it may be noted that when the first appeal was filed to the District Court, it was not valued on this basis, but was valued on the original claim.

The appellant, therefore, must repay the Court-fee which was refunded. A week's time is allowed for making this payment. *Court fee called for.*

A. I. R. 1922 Bombay 173.

MACLEOD, C. J. AND SHAH, J.

Bharmappa, Adoptive father, Bharamagauda Mudigaudar—Appellant

v.

Ujjangauda, Adoptive father, Bharamagauda—Respondent.

S. A. No. 804 of 1920, decided on 27th September, 1921, from decision of Dist. J., Dharwar in A. No. 116 of 1918.

Hindu Law — Inheritance—Dumbness congenital and incurable is a ground for exclusion—But a person having a dumb grandson is not 'sonless' and cannot adopt another—Hindu Law—Adoption.

According to the Hindu law a person affected by dumbness which is congenital and incurable is excluded from inheritance; but a person having a grandson subject to the defect of such dumbness cannot correctly be described as sonless. Adoption by him during the lifetime of the grandson is not valid. (1867) 4 Bom H C. (A. J. C.) 135 followed. [P. 174, Cs. 1, 2.; P. 176; C. 1.]

Coyajee with *Nilkanth Atmaram*—for Appellant.

Tyabji with *S. V. Palekar*—for Respondent No. 1.

Shah, J.:—The facts which have given rise to this appeal are few and not now disputed. One Bharmagauda had a son of the same name. That son had two sons, Basangauda and Ujja. The son (Bharmagauda) and the grandson Basangauda predeceased the father Bharmagauda. This Bharmagauda adopted the present plaintiff during the lifetime of his grandson Ujja. This Ujja is found by the lower Courts to have been dumb from his birth. Bharmagauda died in 1915; and the present suit was filed in 1916 by the plaintiff, as the adopted son of Bharmagauda, to recover possession of the property from the defendant No. 1 (the grandson of Bharmagauda) on the ground, that owing to dumbness and insanity he was disqualified to inherit his grandfather's property. The defendant No. 1 repudiated the allegations, and contended that the plaintiff's adoption was invalid.

The allegation as to the insanity of defendant No. 1 was not proved but it is found that from the time of his birth the defendant No. 1 was dumb and that his dumbness was incurable. The lower Courts held that the adoption of the plaintiff by Bharmagauda, the grandfather of defendant No. 1 was proved and that it was valid, and accordingly decreed the plaintiff's claim.

In support of the appeal to this Court it is urged on behalf of the legal representative of defendant No. 1, who died during the pendency of the appeal in the District Court, that the defendant No. 1 was not disqualified according to Hindu law, and that even if he was disqualified, the adoption of the plaintiff by Bharmagauda during the lifetime of the grandson was invalid.

As regards the first contention, it is clear on the finding of fact, that the defendant No. 1 (Ujja) was dumb from his birth and that his dumbness was incurable. According to the Mitakshara such a son or grandson would be excluded from inheritance. No doubt Yajnavalkya does not mention a dumb person among those who are excluded from inheritance. But Vijnanesvara includes him in the list under the word *Adya* on the authority of Manu. In the Vyavahara Mayukha also, on the authority of the same text of Manu, a dumb man is referred to, as excluded from inheritance.

It is urged, however, that this ground of disqualification, like several other grounds, has become obsolete, and the observations in *Surayya* v *Subbamma* (1) have been relied upon in support of this argument.

(1) (1919) 43 Mad. 4=53 I.C. 498=37 M.L.J. 405.

It also appears that in Steel's Hindu Law and Custom it is stated at page 224 that "lame and deformed persons are not excluded, nor are the deaf and dumb." It may be that some of the grounds of exclusion from inheritance mentioned in the texts are obsolete.

While I agree generally with the observations in the above case, as to the hardship and obsolete nature of some of the grounds of exclusion from inheritance, I do not see how all of them could be treated on the same footing. Each defect must be considered on its merits, and if it could be fairly and safely stated that it is obsolete, it may be treated in that manner. But it would not be right, nor does it appear to me to be possible, in view of the decisions on the point, to treat all these grounds as obsolete.

In the present case we are concerned only with congenial and incurable dumbness. The effect of such a defect on the right to inherit was considered by this Court so far back as 1867 in *Vallabhram Shivnarayan* v. *Bai Hariganga* (2) and it was held after full argument that according to the Hindu Law prevailing on this side of India, a person born dumb was incapable of inheriting. That decision is binding upon us: and I see no good reason to refer this question to a Full Bench for consideration. It follows that Ujja was excluded from inheritance on account of his dumbness from birth.

The next question is, whether the adoption of the plaintiff during Ujja's lifetime is valid? It may be stated that the subsequent death of Ujja during the pendency of this litigation, without having a son does not affect the question as to the validity of the plaintiff's adoption. If it was invalid at the time, the subsequent event cannot validate it. This position has not been seriously questioned before us, and it seems to me to be clear, that the validity of the plaintiff's adoption must be determined with reference to the facts, as they existed at the date of the adoption.

It is not disputed, and in fact it is indisputable, that in the life-time of a natural son, grandson or great grandson no valid adoption could be made This is clear from the Dattaka Mimamsa Section I, paragraphs 3, 6 and 13 (Stokes' Hindu Law Books, pages 531, 532 and 533). But it is urged, that the existence of a grandson, disqualified as in the present case, is no bar to an adoption by the grandfather. There is no decided case on this point: and so far as I have been able to see, there is nothing in the Mitakshara or the Vyavahara Mayukha, to lend support to this view.

The basic principle of adoption, as I understand it to have been laid down by the Smriti writers, does not support the contention. The opinions expressed by writers on Hindu law are conflicting; and treating it as a point of first impression, at least so far as this Presidency is concerned, I have come to the conclusion, that the fact of the grandson suffering from dumbness by birth, does not render the adoption valid which would be otherwise invalid on account of its having been made during his life-time.

I shall state my reasons briefly for this conclusion. In the first place we have the texts of Atri, Manu and Saunaka, which lay down that the adoption can be made only by a person who has no son, *i.e.*, who never had a son or whose son is dead. The Dattaka Mimamsa begins with the text of Atri, and in the first section, the author refers to the text of Saunaka and Manu (see paragraphs 3, 4 and 9 of Section 1 in Stokes' Hindu Law Books at pp. 531, 532 and 533).

The essential condition for a valid adoption according to these texts is, that the adopter must be sonless at the time of the adoption. While speaking of an "adoption" Yajnavalkya does not refer to this condition; nor does Vijnanesvara refer to it in his commentary on Yajnavalkya's verse (see paragraphs 9 to 15 of Chapter I, Section 11 of the Mitakshara-Stokes' Hindu Law Books, pages 415-418). It is significant, however, that while referring to the disqualifying circumstances in Chapter II, Section 10, Yajnavalkya provides, that the sons (natural and *kshetraja*) of those who would be excluded from inheritance are not subject to any disability, provided they are free from similar defects; and Vijnanesvara points out that, natural and *kshetraja* sons are mentioned with a view to exclude other sons mentioned before. (See Mitakshara, Chapter II, Section 10, paragraphs 10, 11 and 12; D.S.P.

(2) (1867) 4 Bom. H.C. (A C. J.) 135.

Stokes' Hindu Law, page 457). It is also further provided that the unmarried daughters of those who are excluded from inheritance and the sonless wives of such persons are to be maintained. It is clear from these passages that neither Yajnavalkya nor Vijnanesvara would have favoured the view that a person having a son subject to any of the defects mentioned by them could be treated as sonless.

Indeed it also appears from Visvarupa's commentary on these verses of Yajnavalkya that those who are excluded from inheritance are not necessarily incompetent to perform sacrifice, etc. This passage is translated at page 16 of the report in *Surrayya* v. *Subbamma* (1), and the original passage in Sanskrit may be found in Setlur's Mitakshara at page 838. I also find in Apararka's commentary on the same *Smriti* that there is no such general disqualification to perform religious functions. [See Yajnavalkya's Smriti in Apararka's commentary Anandashram Series, Vol. 46 (Part II), p. 750].

In the Vyavahara Mayukha there is no indication in the chapter relating to adoptions that a son, subject to any defect which would exclude him from inheritance, was no son at all. On the contrary the text of Saunaka has been referred to and *aputrena* has been translated "as one having no male issue or one whose male issue has died." (See Mandlik's Hindu Law, page 52 or Stokes' Hindu Law Books, page 60—paragraph 10 of Vyavahara Mayukha, Chapter IV, Section 5) and I may here refer to the observation in Mandlik's Hindu Law, Appendix IV at p. 456 that "a sonless man alone at present adopts a son." In the chapter relating to persons excluded from inheritance there is nothing to indicate that a person, having a dumb son, was to be treated as sonless.

The Dattaka Mimamsa does not, in my opinion, afford any indication to the contrary. The passage in Section 11, paragraph 62 (Stokes' Hindu Law Books at p. 561), has been relied upon as showing that persons subject to disqualifying defects are no sons at all. In the first place the reference to persons excluded from inheritance is incidental; and if it is read in relation to the context and the argument in relation to which the reference is made, I am not clear that the passage means what it is argued before us means. It has been interpreted, however, by some writers on Hindu Law, whose opinions are entitled to weight, as supporting the contention on behalf of the respondent. But apart from the difficulty of determining the true meaning of this reference to "impotent persons and the rest," this much is clear that there is no such opinion expressed by Nanda Pandita in the first section where he deals with the question, as to who can adopt.

Next he proceeds to deal with the question, as to who is to be adopted. In that section several opinions expressed by the author have been treated as merely recommendatory and not obligatory. I am not, therefore, prepared to accept the contention that the opinion of Nanda Pandita is that a son subject to a disqualifying defect is no son at all as regards the power of the father to adopt, nor am I prepared to give effect to an opinion, not supported by any Smriti, expressed incidentally in the course of an argument on another point, and not stated at the place where he would be expected to state it if it were his opinion.

It is needless to refer to the opinions of writers on Hindu Law in detail. I may here mention that in spite of the respectable body of opinions in favour of the view that a second adoption in the life time of another adopted son was permissible, the Privy Council held in *Rungama* v. *Atchama* (3) that such an adoption was invalid. On the point now under consideration the weight of opinions in favour of the view, that the adoption is valid, is by no means so great as it was in favour of the view once held that a second adoption during the life-time of the first adopted son was valid. The task of reconciling these opinions is difficult: and after all we have to consider whether the Hindu Law goes so far as to lay down that a son subject to a disqualifying defect is no son at all for the purpose of enabling the father to make a valid adoption during the life time of such a son.

I may, however, refer to the inference drawn by Sutherland in his synopsis of the Dattaka Mimamsa and Dattaka Chandrika (Stokes' Hindu Law Books at page 664), and to the

(3) (1846) 4 Moo. I.A 1=7 W.R 57=1 Suther, 197=1 Sar. 313 (P.C).

opinion expressed in Strange's Hindu Law at page 77 (Vol. 1) in favour of the view that an adoption in the life time of a disqualified son is valid. This opinion is accepted in Sarkar's Treatise on Adoption, page 196 (2nd edition) and Ghose's Hindu Law, Vol. I at page 669 (3rd edition).

In Steele's Hindu Law and Custom at page 42 it is stated that "insanity of a begotten son is no legal cause of adoption. An adoption can take place only where no begotten son or grandson exists, or where the begotten son has lost caste." This remark was quoted apparently with approval in *Rangama's case* (3). It is true that at page 181 of the same book it is stated as follows:—"It is allowed in case of a begotten son becoming outcaste or insane or otherwise becoming incapable of conducting the family affairs: such adoption is in the name of the son. A madman is, however, seldom married, and an outcaste is often re-admitted. No son can be adopted during the life-time of a begotten son, not disqualified as above."

As already pointed out the same author has stated that a dumb person is not excluded from inheritance. But this Court has not accepted that opinion and the statement of the custom on the present point, which even if strictly taken, may not cover the case of a dumb person without proof of his being "incapable of conducting the family affairs," could hardly be preferred to his statement of law on the some point, (p. 44).

On the best consideration that I can give to the point, I do not think that a person, having a grandson who is subject to the defect of dumbness from his birth as in the present case, can correctly be described as sonless so as to make an adoption by him during the life-time of the grandson valid.

I base this conclusion upon the Mitakshara and the Vyavahara Mayukha and next upon the Dattaka Mimamsa and the Dattaka Chandrika as I understand them. I hold, therefore, that the adoption of the plaintiff was invalid. I would allow this appeal and dismiss the plaintiff's suit with costs throughout.

Macleod, C. J.:—I concur.

Appeal allowed.

A. I. R. 1922 Bombay 176.

MACLEOD, C. J. AND SHAH, J.

Zipru Chindhu Shimpi— Plaintiff-Appellant v.

Bomtya Dagadu Kumbhar and another— Defendants-Respondents.

S. A. No. 7 of 1921, decided on 2nd September, 1921, from a decision of D. J., Khandesh in No. 283 of 1919.

Hindu Law — Succession —Sudras—Legitimate grandson cannot succeed to illegitimate son's property.

Under Hindu Law, because the illegitimate son of a Sudra cannot inherit the separate property of his father's legitimate son, as a brother, a son of a legitimate son of a Sudra cannot inherit the property of an illegitimate son of his ancestor

[P. 176, C. 2.]

W. B. Pradhan—for Appellant.

S. V. Palekar — for Respondents No. 1 & 2.

Shah, J.:—In this case one Vedu had two sons; a legitimate son called Chindhu and an illegitimate son called Dhaklu. Chindhu died leaving a son named Zipru. Dhaklu died without leaving any relations, and it is with reference to the property of Dhaklu that the present suit is brought by Zipru to establish his claim as heir to Dhaklu.

It is established now, and in spite of the argument of the appellant to the contrary it must be accepted, that the illegitimate son of a Sudra cannot inherit the separate property of his father's legitimate son, as a brother. It is sufficient to refer to the decision in *Dharma* v. *Sakharam* (1), in which the earlier decisions bearing on this point have been referred to. It has been argued that it does not follow necessarily from that decision that Zipru, the son of the legitimate son of the original ancestor, could not inherit the property of Dhaklu, the illegitimate son of Vedu.

There is no authority on the question before us; but if the rule in *Dharma* v. *Sakharam* (1) is to be consistently followed, I do not see how a collateral could succeed to the property of an illegitimate son, when that son is not entitled to collateral succession. It necessarily follows that Zipru could not inherit the property of Dhaklu; and his claim to that property must fail.

The decree of the lower appellate Court is right and must be affirmed with costs.

Macleod, C. J.:—I agree.

Decree affirmed.

(1) (1920) 55 I. C. 306=44 B. 185=22 Bom. L. R. 52.

A. I. R. 1922 Bombay 177 (1).

PRATT AND FAWCETT, JJ.

In re Dagdoo Bapu.

Criminal Appl. for Rev. No. 84 of 1921 decided on 15th June, 1921.

Criminal P. C., Ss. 512 and 337—Tender of pardon for purpose of receiving evidence under S. 512—Pardon is validly tendered.

In an enquiry into an offence of murder a pardon was tendered to the accused and evidence was recorded under Section 512; the validity of the tender of pardon being questioned.

Held: the offence of murder being under enquiry in order to secure evidence the accused was made approver and a pardon was tendered to him which was valid. But the proceeding under Section 512 is only ancillary to that enquiry, and a tender of pardon does not prevent the prosecution being started against the approver as accused. In such a case the approver may plead pardon as defence. On the ground that the approver has failed to perform the conditions of the pardon by giving false evidence under Section 512, the prosecution may proceed against him. A magistrate has power to discharge an approver from custody, if the prosecution do not proceed further in the case against the principal offender. [P. 177, C. 2]

S. S. Patkar—for the Crown.

Pratt, J.:—This is a reference made by the Second Presidency Magistrate of Bombay requesting revision of an order made by him on the 26th November, 1920, granting a pardon to an accused, Dagdoo Bapu, under Section 337, Criminal Procedure Code.

The offence under inquiry was an offence of murder and the accused was placed before the Magistrate on a charge of that offence on the 7th September, 1920. But as the prosecution case was that another accused, Dhondoo Sumbhoo, who had absconded, was the principal offender the pardon was tendered. The principal offender has not been arrested, and it appears there is no prospect of his arrest or trial.

The prosecution desire the discharge of Dagdoo Bapu as otherwise he would be detained for an indefinite period in the custody as an approver.

The Magistrate suggests that the pardon was invalid, as it was not tendered for the purpose of an enquiry but for the purpose of securing evidence under Section 512, Criminal Procedure Code. There is no substance in this distinction. The offence of murder was under inquiry and in order to secure the approver's evidence as to this offence a pardon was tendered, and the proceeding under Section 512 was only ancillary to that inquiry. There is, therefore, no ground for revision of the Magistrate's order under Section 337.

We would point out, however, that there is no occasion for revision of the order. The tender of a pardon does not prevent the prosecution from proceeding against an approver as an accused person. If the prosecution is so revived it is for the approver to plead the pardon as a defence; see *Emperor* v. *Kothia* (1) and *Emperor* v. *Sabar Akunji* (2). It is open to the prosecution to proceed against the approver Dagdoo on the ground that he has not performed the condition of the pardon in that he gave false evidence under Section 512, Criminal Procedure Code.

Or on the other hand, if the prosecution do not desire to proceed further with the case against the principal offender, Dhondoo, the Magistrate has power to discharge the approver from custody. Sub-Section 3 of Section 337, Criminal Procedure Code, implies that there is a trial in progress and its object is to secure the evidence of the approver for such trial. If there is no such trial and no likelihood of such a trial, then *cessante ratione lex ipsa cessat.*

Rule discharged.

(1) (1906) 30 Bom. 611=8 Bom. L. R. 740.
(2) (1914) 42 Cal. 756=27 I.C. 184=19 C.W.N. 179.

A. I. R. 1922 Bombay 177 (2).

MACLEOD, C. J. AND SHAH, J.

Chudasama Khoduba Sartansang and others—Defendants-Appellants

v.

Chudasama Takhatsang Narasingji and others—Plaintiffs-Respondents.

S. A. No. 73 of 1916, decided on 1st April, 1921, against the decision of Joint J., Ahmedabad.

Evidence Act (1 of 1872), S. 65—Secondary evidence—Certified copy—Original produced in an old suit—Copy can be relied upon by Court.

Where the plaintiff used for a declara-

tion that certain survey numbers were kept joint at a partition between the ancestors of the parties, relying upon a certified copy of a partition deed passed between the parties, and the copy which was produced showed that the original document was produced in Court in a previous suit.

Held, the Court could rely on the certified copy as showing the terms of the partition there being no reason to doubt, owing to the lapse of time, that the certified copy retained on the file of the previous suit was a correct copy of the original.

[P. 178, C. 1.]

G. N. Thakur—for Appellants.

G. S. Rao and *R.W. Desai*—for Respondents Nos. 1 and 2.

B. D. Mehta for *N.K. Mehta*—for Respondents Nos. 9 to 11.

Macleod, C. J.:—The plaintiffs filed this suit for a declaration to the effect that Survey Nos. 177 and 40 of the Tagdi village, bounded as described in the plaint, belonged in common to all the 100 *Dokda* sharers of the village for use as common pasture and grain-yard, and for a perpetual injunction restraining the defendants from using the land of the said numbers, either by themselves, or through others, for other purposes, and from interfering with the plaintiffs either by themselves or through others in the use of the same for the said purposes. The plaintiffs' case is that the village of Tagdi was first partitioned into two main shares of 50 *Doklas* each in 1809, when lands of the Padar and grain-yard were kept joint. They rely upon the certified copy of the document passed between the parties' ancestors in that year. The original was not forthcoming, but the copy which was produced showed that the original was produced in Court in 1823.

It has been ascertained from the original record that the certified copy which had been retained on the file of that suit corresponded with the copy produced, Exhibit 337. There can be no doubt that in that deed of compromise between the two branches the whole of the village Padar, including the *khalas* or threshing floor, was kept joint.

It has been contended that the Court could not rely on a certified copy as evidence of the compromise. But considering the time that has expired, there is no reason whatever to doubt that the certified copy retained on the file of that suit is a correct copy of the original. The Courts were perfectly correct in relying on it as showing the terms of the compromise.

The question is then raised whether the present Survey Nos. 177 and 40 were the village Padar in 1809. A very large number of documents have been referred to, from which it appears that the old Survey Numbers were 33 and 110. The Courts have referred to the village map and to the village *Khardars*, and came to the conclusion that the present Survey Nos. 177 and 40 are waste open lands. The position of those Survey Numbers on the map at p. 11 of the print shows conclusively that those Survey Numbers from their very position must have been open sites used for the purposes of pasture and grain-yards. Survey No. 177 is next to the village site, Survey No. 40 is adjoining the village tank. They have also been entered in the Government Registers as waste land.

It is not suggested that they had ever been turned into arable land and had paid assessment. The fact that some of the defendants got their names entered in the Government Survey Records in regard to these two numbers does not in any way change the nature of these lands and make them the separate property of the defendants instead of being joint between the plaintiffs and the defendants.

The defendants sought to prove that they had ousted the plaintiffs from the common user of these Survey Numbers and that they had acquired a title to them by adverse possession. That is a plain question of fact and has been found against the defendants. The learned appellate Judge at p. 4 says: "I entirely agree with the lower Court that the plaintiffs' witnesses, who are more reliable than those of the appellants, prove that there has been continuous joint user of both the Survey Numbers in dispute by all the 100 *Dokda* sharers."

It has been urged before us that the Court in its judgment put on the record as Exhibits documents which had not been referred to in the course of the argument so that the defendants had not the opportunity of showing that they do not support the plaintiffs' case, or of exhibiting further documents in order to get rid of the effect of those Exhibits. The numbers of those Exhibits

are 345, 346 and 347. The Court exhibited portions of certain Sim Khardas and of a Field Book, all of which are Government records. The point was raised in first appeal, but I cannot think that it was then seriously contended by the appellants that the trial Court had made a serious error in regard to these documents in the course of its judgment.

Amongst the mass of documents which must have been produced for the purpose of the case, no doubt these Government records were produced, and the judge, as he was entitled to do, referred to portions of them and marked the specific portions which he referred to as Exhibits. If the appellants had considered that the trial Judge had committed a serious error, and had urged this point as strongly before the lower appellate Judge, as has been urged before us, I think it is certain that he would have referred to such a contention in his judgment. The argument must really depend on certain facts as to what happened in the trial Court, and without those facts it is extremely difficult to consider in Second Appeal whether the appellants had any grievance at all: it is one of those points which are argued, the more strenuously the further the appellant gets away from the trial Court, and I am not disposed to consider that the appellants have a real grievance when they have not even taken the trouble to set out the facts upon which their grievance must depend.

Apart from these Exhibits, it is obvious that the Courts have relied upon other documents in order to come to the conclusion that the old numbers corresponded with the present numbers; and even striking out all these documents, as I have already pointed out, the very situation of these Survey Numbers points almost inevitably to the conclusion that they always have been waste lands. When we find that they were registered as waste land and never paid assessment, the conclusion becomes more certain.

In my opinion, therefore, the judgments of both the lower Courts were perfectly correct. The appeal must be dismissed with costs.

Shah, J.:—I agree.

Appeal dismissed.

A. I. R. 1922 Bombay 179.

KANGA, J.

Mithabai—Plaintiff

v.

Meherbai and others—Defendants.

O. C. J. Suit No. 1962 of 1919, decided on 18th February, 1921.

(a) *Hindu Law—Will—Devise to widow as* 'malik' *but asking her to apply and spend it 'in good way'—Only gets life-estate but with full powers of disposition by acts* inter vivos.

Where a Hindu testator devised the residue of his estate to his widow in the following words:—"As to whatever surplus of my property may remain over after my decease, the *malik* thereof shall be my wife. She shall during her life-time apply and spend the same in a good way....."

Held: the words "she shall during her life-time apply and spend the same in a good way" cut down the absolute estate created by the use of the word *Malik* to a life-estate, and therefore the widow took a life estate with full powers of disposition by acts *inter vivos* and not an absolute estate.

The use of the word "*malik*" in connection with a devise to the widow imports full proprietary rights, unless there is something in the context to qualify it. The fact that the donee is a Hindu widow does not by itself furnish such qualification. [P. 181, Cs. 1, 2.]

(b) *Probate and Administration Act (V of 1881), S. 90—Hindu widow as executrix—Conveyance reciting both capacities, must be taken to be, as an executrix—Deed—Construction.*

Section 90 of the Probate and Administration Act applies to all Hindu widows, and under that section a Hindu widow who is appointed as an executrix, is entitled to sell as executrix the property left by her husband, if no restriction is imposed on her powers of disposing of the property by the Will which appointed her executrix. A sale by a Hindu widow, who being the executrix of her husband's Will sells a part of her husband's estate and the deed does not expressly say in what particular capacity she sells, but merely recites all her capacities and conveys the whole property and all the title possessed by the widow in the property, must be taken to be effected by the widow in her capacity of executrix of her husband's Will. [P. 182, C. 1.]

Mulla with *Mehta*—for Plaintiff.

B. J. Desai with *Strangman*—for Defendants.

Judgment:—One Jasvir Bhudar died in the month of May, 1893, leaving him surviving his widow Bai Divali as his only heir according to Hindu Law. He left a Will dated the 2nd day of May, 1893, whereof he appointed his widow, the said Bai Divali, the sole executrix. Bai Divali proved the Will and obtained Probate

thereof on the 11th November, 1893. From the schedule to the petition for Probate it appears that Jasvir Bhudar owned an immoveable property at Jambli Mohola and another immoveable property at Falkland Road, an outstanding debt of Rs. 36,000, stock-in-trade of the value of Rs. 2,000 and household furniture and apparel of a small value. After obtaining Probate of the Will Bai Divali sold the property at Falkland Road to Ratanbai and conveyed the same to her by a conveyance dated the 2nd day of June, 1894.

On the 28th November, 1898, Ratanbai conveyed to N. C. Shroff the said property. The defendants are the heirs and legal representatives of the said N. C. Shroff. Bai Divali died on the 6th January, 1917, and the plaintiff claiming to be the reversionary heir of Jasvir Bhudar has filed this suit, praying that it may be declared that Bai Divali only took a widow's estate under the Will of her husband and that on the death of Bai Divali she became entitled to the said Falkland Road property and that the defendants should be ordered to deliver possession of the said property to the plaintiff.

On the evidence of the plaintiff I hold that she is the reversionary heir of Jasvir Bhudar.

The next question that arises is, what interest did Bai Divali take under the Will of her husband? The clause in the Will of Jasvir Bhudar whereby the residue is devised to Bai Divali runs as follows:—

"As to whatever surplus of my property may remain over after my decease the (Malik) owner thereof is (shall be) my wife Divali. She shall during her life-time apply and spend the same in a good way. As to the surplus that may remain over after the performance of her, that is to say, my wife's *Karaj Avasar* (funeral and subsequent ceremonies) all that shall be used for good purpose. Except my executrix no one else nor my heirs or representative whatever shall have any right to or interest in my property."

It was contended by Mr. Desai that Bai Divali took an absolute estate under the said Will, and reliance was placed by him on the Privy Council decisions in *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy* (1) and *Surajmani* v. *Rabi Nath Ojha* (2).

The word "Malik" is used by Jasvir Bhudar in his Will in connection with the devise to Divali. The said word, according to the said Privy Council decisions, imports full proprietary rights unless there is something in the context to qualify it. The fact that the donee is a Hindu widow is not sufficient for that purpose. If, therefore, there had been no qualifying words in the Will, as the word 'Malik' in connection with the devise of the residue to Divali has been used, there would have been no difficulty in holding that Bai Divali took an absolute estate. Mr. Mehta cited *Hirabai* v. *Lakshmibai* (3), but the word used in connection with the devise to the widow in that case was "heir" and not "Malik" and that decision has, therefore, no application to this case. The decision in *Harilal* v. *Bai Rewa* (4), cited by Mr. Mehta, seems to be in point; for, there the Gujarati word in the Will is translated "owner." But Mr. Mehta has not informed me, and I have not been able to find out, what the Gujarati word used in the Will in that case was. My impression is that the Gujarati word used there was "*dhani*."

I take it that the Gujarati word translated 'owner' would import full proprietary rights and in the Will before the Court in the case of *Harilal* v. *Bai Rewa* (4) there was nothing to qualify the word translated 'owner.' The Court of Appeal in that case thought that the fact that the legatee was a Hindu widow was sufficient to qualify the word translated 'owner,' and accordingly held that the legatee in that case took a widow's estate.

The authority of *Harilal* v. *Bai Rewa* (4) is, in my opinion, considerably shaken by the above cited Privy Council decisions. However, the word used in this Will, *viz.*, 'Malik,' is the same as that used in the Privy Council decisions, and, unless there are some words to qualify it, I must hold that Bai Divali took an absolute estate.

The qualifying words in the Will which are relied upon by plaintiff's Counsel are—"During her life-time she shall apply and spend the same in a good way." No doubt the law requires that if there is

(1) (1897) 24 Cal. 834=24 I.A. 76=1 C.W.N. 387=7 Sar. 155 (P.C.).

(2) [1908] 30 All. 84=35 I.A. 17=5 A.L.J. 67=10 Bom. L.R. 59=18 M.L.J. 7=12 C.W.N. 231=7 C.L.J. 131=3 M.L.T. 144 (P.C.).

(3) (1887) 11 Bom. 573.

(4) (1887) 11 Bom. 376.

an absolute gift in the first instance you must have very clear words to cut down the absolute estate; and it may be said that the words "during her life-time she shall apply and spend the same in a good way," used by the testator, express the object of his having made an absolute gift. *Jones, In re, Richards* v. *Jones* (5).

But taking into consideration the fact that the aforesaid words are used in reference to a Hindu widow and the fact thatthe qualifying words used in the Will are very similar to those used in the Will in *Mafatlal Motilal* v. *Kanailal Trikamlal* (6), where the learned Judges of the Court of Appeal held that a life-estate had been created, I come to the conclusion that the words "during her life time she shall apply the same and spend in a good way" cut down the absolute estate created by the use of the word 'Malik,' and hold that Bai Divali took a life estate and not an absolute estate.

The next question for consideration is, what are the nature and incidents of such life-interest? Mr. Mehta has contended that whatever might be Bai Divali's powers during her life-time over moveables, in immoveables she had only a life-estate, and that she could only enjoy the income of the immoveable properties and nothing more. In the Will itself there are no words to the effect that she was to use and spend the income only. The Will says: "She shall during her life-time apply and spend the same," that is to say, all the residue of the testator's property.

The clause in the Will containing the disposition of the residue of the testator's property is very much like the clause in the Will in *Mafatlal Motilal's case* (6), where, on the construction of the Will the Court of Appeal held that the testator's son's widow took a life-estate with full powers of disposition by acts *inter vivos*. Mr. Mehta contended that *Mafatlal Motilal* v. *Kanailal Trikamlal* (6) was the case of a daughter-in-law and was not the case of a widow of the testator.

But, in my opinion, that does not make the slightest difference because a daughter-in-law in the Bombay Presidency inherits only as a widow of a *gotraja sapinda* and is entitled, when she succeeds as an heir, to a widow's estate. She is in the same position as a Hindu widow. I, therefore, hold that Bai Divali took a life estate with uncontrolled powers of disposition by acts *inter vivos*; *Mafatlal Motilal* v. *Kanailal Trikamlal* (6) and *Pounder, In re, William* v. *Pounder* (7).

Mr. Desai further argued that even if Bai Divali took a life-estate with no powers of disposition during her life time, she being an executrix, the conveyance to Ratanbai should be deemed to have been a conveyance by her as executrix. Bai Divali took out Probate in 1893 and conveyed the property to Ratanbai in June, 1894. The conveyance (Exhibit B) does not mention in what particular capacity Bai Divali sold and conveyed. All the various capacities are mentioned and then the conveyance says:

"She, the said Bai Divali, doth by these presents grant, bargain, sell, assign, release, convey and assure unto the said Ratanbai the said property and all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, claim and demand whatsoever of the said Bai Divali in and to the said premises and every part thereof."

Then, in the conveyance there is a covenant for title given by Bai Divali. At the date of the conveyance (Exhibit B) the Falkland Road property, which is in dispute in this suit, was in the hands of Bai Divali as executrix and she was competent as executrix to sell it to Ratanbai, who was a *bona fide* purchaser for valuable consideration. But it is argued that she did not sell or convey as executrix because the deed shows that she intended to convey as beneficial owner, being under the impression that she took the property absolutely under the Will of her husband.

I am of opinion that the deed shows that Bai Divali conveyed the whole property and all the title she possessed in the property, and that would include the right and title possessed by her as executrix: see *Gangubai* v. *Sonabai* (8) and *Biraj*

(5) (1898) 1 Ch. 438=67 L. J. Ch. 211=46 W. R. 313=78 L. T. 74.

(6) (1915) 17 Bom. L. R. 705 = 30 I. C. 915.

(7) (1887) 56 L. J. Ch. 113=56 L. T. 104.

(8) (1916) 40 Bom. 69=28 I. C. 544=17 Bom. L. R. 303.

Nopani v. *Pura Sundary Dasee* (9).

Mr. Mehta argued that in the petition for Probate the value of the property was given at Rs. 10,800 and that the sale by Bai Divali to Ratanbai was for Rs. 4,000, and, therefore, Ratanbai must have thought that the title was doubtful and paid to Bai Divali a very low price. But as pointed out by Mr. Desai, the value in the petition for the purposes of Probate was arrived at by taking into consideration the fifteen years' rent of the property. As the lease was thought to be determinable at will, no purchaser would pay anything more than the value of the building to Bai Divali.

Mr. Mehta has further argued that it would be dangerous to hold that if a Hindu widow, who is also an executrix, sold and conveyed, she should be deemed as conveying as an executrix. I do not see any danger in so holding. The Legislature has expressly applied Section 90 of the Probate and Administration Act to all Hindus, including Hindu widows, and under Section 90 of the Probate and Administration Act a Hindu widow, who is appointed an executrix, would be entitled to sell as executrix the property left by her husband, if no restriction was imposed on her powers of disposing of the property by the Will which appointed her executrix.

There are no words used in this Will imposing any restriction on the powers of the executrix. Therefore, there was nothing to prevent Bai Divali from selling and conveying this property as executrix. If she could have sold as executrix under Section 90 by so stating expressly in the conveyance, I do not see any difficulty in holding that she sold in all the capacities she possessed when the deed (Exhibit B) does not expressly say in what particular capacity she has sold but merely recites all the capacities.

I, therefore, hold that the sale to Ratanbai should be deemed to be a sale by Bai Divali as the executrix of the Will of Jasvir Bhudar.

Then Mr. Desai has raised some further issues and, relying on Section 51 of the Transfer of Property Act, has contended that the defendants are entitled to the relief claimed in prayer (2) of the counterclaim. Mr. Desai has also contended that in any event the interest of Jasvir Bhudar had been terminated and that no interest of his estate remained in the Falkland Road Property.

It appears from Exhibit No. 3 that one Narasinga Saibu leased to one Bhansalee Bhagvandas, on the 15th November, 1869, the property in suit ; and it appears that the said lease was a lease at will. Jasvir Bhudar derived his title as lessee from Bhansalee Bhagvandas. On the 10th June, 1894, Narasinga Saibu gave another lease of the said property to Ratanbai on her application. Subsequently, Bomanjee Shapurjee Chothia became the owner of Narasinga Saibu's interest in the property as landlord, and, on the 10th June, 1906, he terminated the lease and granted a lease for 99 years to N. C. Shroff, whose representatives the defendants are. It appears from the evidence of the Bhayya that the building in 1907-08 was in a dilapidated condition and that two of the walls were pulled down, and the floors and walls were re-built. No books of account have been produced to show how much was spent in the repairs and re-building of the walls that were pulled down. The Bhayya says that about Rs. 5,000 were spent. The evidence on this point is very meagre and it is very difficult to say how much was spent on the improvements.

Mr. Desai argues that if under Section 51 of the Transfer of Property Act he is asked to pay for interest of Jasvir Bhudar in the property, that interest would be at the most of the value of Rs. 500. Mr. Mehta says that the interest would be of the value of Rs. 20,000. I have got no materials before me for determining what the value of that interest would be. I think that it would certainly be more than Rs. 500.

If I am wrong on the construction of the Will and in holding that Bai Divali should be deemed to have conveyed the property as an executrix to Ratanbai, then the lease granted on the 10th June, 1906 to N. C. Shroff should be taken to be a lease for his benefit during the lifetime of Bai Divali only and after her death the estate of Jasvir Bhudar would be entitled to the benefit of that lease and the defendants at the most would be entitled to have credit for the improvements

(9) A. I. R. 1914 P. C. 92=42 Cal. 56=41 I. A. 189 (P. C.).

Suit dismissed with costs. No order on the counter-claim.

Suit dismissed.

A.I.R. 1922 Bombay 183.

MACLEOD, C. J. AND SHAH, J.

Chunni Lal Ratanchanda Gujarathi — Plaintiff-Applicant

v.

Laxman Govind Dube—Defendant-Opponent.

Civ. Ex. Application No. 304 of 1920, decided on 29th March, 1921, against a decision of the Sub-J., Pimpalgaon, in Small Cause Suit No. 759 of 1920.

Limitation Act, S. 19—Ruzu Khata *acknowledgment implies promise to pay and can itself form basis of suit.*

The result of certain dealings between the plaintiff and the defendant was that the defendant incurred debts to the plaintiff. When the account of the dealings was made, the defendant signed an acknowledgment for a certain sum. The plaintiff's suit to recover the amount due on the *khata* was dismissed by the Subordinate Judge on the ground that a suit on a *Ruzu Khata* was not to be maintainable.

Held, inasmuch as the acknowledgment made before the limitation period expired implied an unconditional promise to pay, there was no reason why it should not form the basis of the suit. (1906) 33 Cal. 1047, followed. [P. 184, C. 2.]

S. R. Parulekar—for Applicant.

D. C. Virkar—for Opponent.

Macleod, C. J.:—The plaintiff sued to recover on a *Ruzu Khata*, dated 29th June, 1917. There had been certain dealings between the plaintiff and the defendant resulting in the defendant incurring debts to the plaintiff on the 3rd July, 1914, 21st July, 1914 and the 3rd September, 1914. The account was made up on the 29th June, 1917, and after taking into consideration payments made and interest charged, the defendant signed the acknowledgment sued on for Rs. 90. The suit was brought to recover Rs. 90 together with interest at twelve per cent. from the 29th June, 1917. At the hearing the defendant admitted that he had passed the *Khata* sued on and asked for instalments.

The learned Judge held that no suit lay on a *Ruzu Khata* following the decision in *Shankar* v. *Mukta* (1), and accordingly the suit was dismissed with costs. In the case of *Shankar* v. *Mukta* (1) the following questions were referred by the Subordinate Judge to the High Court:—

(1) Is the *Ruzu Khata* sufficient evidence of the promise alleged by plaintiff; (2) Can a suit lie on such promise? The Court aaswered both these questions in the negative.

Reference was made to a number of decisions which were considered by the Court as being authority for the proposition that a *Ruzu Khata* cannot form the basis of a suit, but that, the original transactions forming the basis of the suit, the subsequent *Ruzu Khatas* are only evidence of the debt due serving to prevent the operation of the Statute of Limitation. The Chief Justice at p. 518 said:

"No reasons are assigned by the Courts for the view which they have adopted in opposition to the view that a *Ruzu Khata* is an unequivocal admission of a debt, from which the law implies a promise to pay, and thus (except for limitation purposes) contains in itself all the requisites of a valid contract which can form the immediate basis of a suit. The decisions are possibly based on the provisions of Section 50 of the Civil Procedure Code, which apparently contemplates that the plaintiff should state his original cause of action and treat acknowledgments of it as exceptions taking the case out of the range of the limitation law. However that may be, we think that the authorities are so numerous and uniform as to prevent us from following the technical English law upon this subject."

Clearly the Chief Jnstice would have preferred to follow the English law but for the principle of *stare decisis*.

This question was considered by their Lordships of the Privy Council in *Maniram Seth* v. *Seth Rupchand* (2). No doubt there the plaintiff sued on the original account and relied on an acknowledgment by the defendant to prevent the bar of limitation. The questions were discussed whether an acknowledgment only amounted to a bare acknowledgment of the debt or whether it implied a promise to pay. Their Lordships said at p. 1057:

"An acknowledgment according to the Indian Act must be signed by the party

(1) (1896) 22 Bom. 513.

(2) (1906) 33 Cal. 1047=33 I.A. 165=10 C.W. N.874=4 C.L.J. 94=8 Bom. L. R. 501=3 A.L.J. 525=16 M.L.J. 300=1 M. L.T. 199 (P.C.).

to be affected by it, and the only document, which can be relied upon as an acknowledgment signed by the respondent, is the statement filed by the respondent in the proceedings touching the application for probate, the material part of which has been already set out, but which it is convenient here to repeat. 'For the last five years he' (the respondent) 'had opened current accounts with the deceased.' There is, therefore, a clear admission that there were open and current accounts between the parties at the death of Motiram. The legal consequence would be that at that date either of them had a right as against the other to an account.

"It follows equally that, whoever on the account should be shown to be the debtor to the other, was bound to pay his debt to the other, and it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debt to Motiram or his representative, if the balance should be ascertained to be against him. The question is whether this is sufficient by the Indian law to take the case out of the statute. It has been already pointed out that the acknowledgment was made before the statutory period had run out. Thus one requisite of Section 19 is complied with. The necessity of signature by the party to be charged is also complied with. The acknowledgment is not addressed to the person entitled, but according to the 'explanation' given in Section 19 this is not necessary.

"We have therefore the bare question of whether an acknowledgment of liability, if the balance on investigation should turn out to be against the person making the acknowledgment, is sufficient. Their Lordships can see no reason for drawing any distinction in this respect between the English and the Indian law. The question is whether a given state of circumstances falls within the natural meaning of a word, which is not a word of art, but an ordinary word of the English language, and this question is clear of any extraneous complications imposed by the statute law of either England or India.

"In a case of very great weight, the authority of which has never been called in question, Lord Justice Mellish laid it down that an acknowledgment to take the case out of the Statute of Limitations, must be either one from which an absolute promise to pay can be inferred, or, secondly, an unconditional promise to pay the specific debt, or, thirdly there must be a conditional promise to pay the debt, and evidence that the condition has been performed. An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do.

"There can be no reason for giving a different meaning to an acknowledgment that there is a right to have the accounts settled, and no qualification of the natural inference that, whoever is the creditor shall be paid, when the condition is performed by the ascertainment of a balance in favour of the claimant."

If, then, the acknowledgment, which in this case was made before the limitation period expired, implies an unconditional promise to pay, I can see no reason why it should not form the basis of a suit. In any event the only penalty which could fall on the plaintiff would be to have to amend his plaint so as to implead the previous transactions. It is clear, therefore that the decision in *Shankar* v. *Mukta* (1) having been overruled in effect by the decision in *Maniram Seth* v. *Seth Rupchand* (2), the plaintiff in this case must be entitled to a decree for Rs. 90 with interest at six per cent. from the 29th June, 1917, to 29th June, 1920, and costs of the suit. The amount to be paid in two annual instalments, the first to be paid within three months from the date these proceedings are returned to the lower Court. The defendant to pay the costs of the Rule.

Shah, J.:—I agree.

Rule made absolute.

A. I. R. 1922 Bombay 184.

MACLEOD, C. J. AND SHAH, J.

Arjoon Vishnu—Plaintiff-Applicant

v.

Hormusjee Shapurjee Seervai—Defendant-Opponent.

C. E. Application No. 333 of 1923, decided on 5th April, 1921.

Contract — Service — Payment by daily wages — Calculation at the end of

month contract is not one of monthly service.

The fact, that a person who works on daily wages is not to be paid at the end of each day, but at the end of each month and the calculation is to be made of the days on which he worked and the amount due for those days, does not make the contract one of monthly service. *Parkin* v. *South Hetton Coal Company*, (1908) 98 L. T. 162, *relied on*. [P. 185, C. 2.]

A. A. Adarkar—for Applicant.

G. N. Thakor—for Opponent.

Macleod, C. J.:—This was a suit filed in the Small Cause Court by the plaintiff against the proprietor of Wimbridge and Co., claiming wages which were due to him. The admitted facts are that the plaintiff received a daily wage, the amount he had earned during the month being calculated according to the days on which he worked. Sundays, therefore, and the days on which the plaintiff was absent, were not paid for. The plaintiff's evidence as shown by the record is as follows:—

"We are not paid for 'Sundays.' Our wages are one rupee per day. Wages are calculated at that rate, though paid in lump. I am also not paid for days absent. We were asking for more pay. Defendant declined and I left. Some others also left." Then correspondence was put in which throws no light on the present question, except that in it the plaintiff claimed that he was a daily labourer, and at the end of the defendant's letter of the 3rd of July appear the following words "The story of 'daily workmen' shows more of the legal touch than a statement of the fact."

There was no suggestion then, when in the correspondence the plaintiff claimed that he was a daily labourer, that he was a monthly servant.

Then the defendant was called and said: "I say plaintiff is a monthly servant. Plaintiff is not paid for Sundays and for absent days. The pay is paid once a month on that calculation."

The record shows that the defendant closed his case, and the finding was "I find that the plaintiff is not a monthly servant and is entitled to his earned wages for twenty-six days. Decree for plaintiff for Rs. 26 and costs."

An application was made to the Full Court. The judgment of the Full Court was as follows:—

"We think this plaintiff was a monthly servant. He admits he stayed away of his own accord. Suit dismissed."

On the evidence recorded in the Trial Court, it is perfectly clear that there was no contract that the plaintiff should only be paid for the work done by him if he completed a month's service. The contract was that the plaintiff should earn a rupee for every day on which he worked. The fact that he was not paid at the end of each day, but that at the end of each month a calculation was made of the days on which he had worked and the amount due for those days, does not make the contract one of monthly service.

We have no indication on the record why the Full Court came to the conclusion that the plaintiff was a monthly servant. From the arguments addressed to us it would appear as if the Full Court had accepted certain statements made at the Bar as evidence, and had accordingly differed from the decision arrived at in the Trial Court.

A very similar question was decided in *Parkin* v. *South Hetton Coal Company* (1). In that case the facts were that the plaintiff was employed as a putter in a colliery, the employment being terminable at any time by fourteen days' notice by either party; his wages depended upon the amount of work done by him upon each day, which was ascertained daily; the wages were payable and were paid fortnightly. The plaintiff, having worked for four days during part of a fortnightly period, refused to continue work without having given notice and was dismissed. The employers refused to pay him any wages for the four days upon which he had worked, upon the ground that they were forfeited. In an action by the plaintiff to recover wages for the four days, the County Court Judge decided that the wages in respect of each day became due as they were earned and that the plaintiff was entitled to recover. It was held by the Court of Appeal that, as the wages were earned daily, though payable only at the end of each fortnight, the plaintiff was entitled to recover wages for days upon which he had worked.

The question, therefore, was whether there was a daily hiring, so that the wages earned became due as they were earned, or whether there was a fortnightly hiring, in which case the wages would

(1) (1908) 98 L. T. 162=24 T. L. R. 193.

not become due until a fortnight's wages had been earned. Sir Gorell Barnes said:—

"I think that this case turns simply upon the question, what was the contract between the parties? No assistance is to be derived from other cases in which different contracts have been construed. In the present case the County Court Judge has found that 'the wages in respect of each shift became due as they were earned, *toties quoties*, on the completion of each successive shift.' In my opinion that was either a finding of fact or an inference of law from the facts. If it was a finding of fact, we are bound by it; and, if it was an inference of law I think that it was right. Therefore the workman's wages were earned each day, though not payable until the end of each fortnight, and there was no fortnightly hiring."

Here in this case on the evidence the finding of the Trial Court was that the plaintiff's wages were earned each day though not payable till the end of the month; therefore there was a daily hiring and not a monthly hiring. There is no justification, therefore, on the record as it stands for the Full Court to have reversed the decision of the trial Court. If the defendant had wished the Court to consider further evidence, that could only have been done according to law. I think, therefore, this Rule must be made absolute and the decree of the trial Court restored.

As to Application No. 332 of 1920, this was a similar suit by another plaintiff against the same defendant. The record was; "By consent decree for plaintiff for Rs. 19 and costs." The record ought really to have been "By consent the decision in the other suit is to be taken as governing the decision in this suit." But as the record stood it seemed as if the defendant had consented to the decree being passed against him. The Full Court, presumably for the same reasons as in the other case, reversed the decision of the trial Court.

For the reasons which I have already given in Civil Extraordinary Application No. 333 of 1920, we restore the order of the trial Court. Rule will be made absolute in both cases with costs throughout.

Shah, J.:—I agree.

Rule made absolute.

A. I. R. 1922 Bombay 186.

MACLEOD, C. J., AND SHAH, J.

Pandurang Balaji Apte—Plaintiff-Appellant.

v.

Mahadeo Gopal Jog—Defendant-Respondent

Civil F. A. No. 293 of 1920, decided on 13th July, 1921, from the decision of 1st Class Sub-J., Satara in Suit No. 616 of 1918.

T. P. Act, S. 55—Vendor and purchaser—Possession of property delivered to vendee—Interest on unpaid purchase-money must be paid to vendor.

Unless there is something in the contract which necessarily imports the opposite, the vendor is entitled in equity to interest on the unpaid purchase-money from the date on which the purchase took place, when the purchaser enters into possession of the property purchased.

[P. 187, Cs. 1, 2]

K. N. Koyajee—for Appellant.

P. B. Shingne—for Respondent.

Macleod, C. J.:—The plaintiff filed this suit to recover the balance of the purchase-money due on a contract of sale dated the 8th November, 1915, whereby he contracted to sell certain property for Rs. 6,000 to the father of the defendants. In pursuance of the contract the possession of the suit land was given to the defendants' father on the 7th December, 1915, but no sale-deed was passed owing to the illness of the defendants' father.

Thereafter disputes arose with regard to the payment, with the result that the defendants, according to the plaintiff's case, only paid Rs. 1,750. The plaintiff, therefore, claimed Rs. 5,362-7-6 according to the account in the plaint together with further interest at seven-and-a-half per cent. on Rs. 4,250.

The defendants raised various defences, but the principal question in the suit was whether the plaintiff was entitled to interest on the unpaid balance of the purchase-money. The lower Court has decided this question against the plaintiff, and directed the defendants to pay Rs. 4,301-14-9 into Court, and to produce a general stamp of Rs. 60; on that being done, the plaintiff was to pass a regular sale-deed to the defendants.

In appeal it has been argued that the decision of the lower Court on the question of interest was wrong. The decision of the Privy Council in *Ratanlal Choonilal* v. *Municipal Commissioner*

for the City of Bombay (1) lays down at page 200, (43 Bom.) the general principle which applies when one party to a contract of sale enters into possession of the property before the whole of the price has been paid, that "unless there be something in the contract of parties which necessarily imports the opposite, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one hand, the new owner has possession, use, and fruits; on the other the former owner, parting with these, has interest on the price."

That is a principle of equity, and it is quite independent of the provisions of the Transfer of Property Act. If the ordinary course is followed, the vendor executes the sale-deed, the purchaser pays the sale price and gets possession. But if, as happened in this case, the purchaser gets possession without paying the whole of the purchase price, then it follows in equity that he cannot retain the money and also enjoy the profits of the property.

The learned Judge in the lower Court has recognised this principle, but considered on the facts of the case that the plaintiff had deprived himself of the advantages which should accrue from this equitable principle owing to his conduct.

Now it may very well be that facts can be proved which would disentitle the vendor to receive more than the balance of the purchase-money. But it seems to me that in considering the facts of the case the learned judge has erred in coming to the conclusion that the plaintiff has acted in such a way that he should not be allowed the benefit of the equity which he would otherwise be entitled to.

After reading carefully the reasons which have been given by the learned judge, it seems to me that that is not the view which should be taken. Various circumstances occurred to cause the delay in the parties settling the payment of the balance of the purchase-money. I cannot think that the conduct of the plaintiff was so blamable as to justify the language of the learned judge, who says "to allow the plaintiff interest would be to allow him to take advantage of his own wrong."

The basis of the principle laid by the Privy Council is that the purchaser, in possession and enjoying the fruits of the property should not at the same time be enjoying the use of the unpaid price, unless it can be shown that the parties have contracted to that effect: and admittedly in the case there was no contract that the purchaser should enjoy the interest on his moneys as well as the profits of the property.

This is one of the cases in which there has been delay from one cause or another in the completion of the purchase. Though the vendor may have been responsible for some of the delay, yet it cannot be said that his conduct has been wrongful so as to deprive him of the benefit of the equitable principle to which I have referred.

I think, therefore, that the appeal must be allowed, and the plaintiff must be entitled, in addition to the amount directed by the order of the lower Court, to interest at five per cent. on Rs. 4,250 from the 7th December, 1915. Interest to be calculated up to the date of payment by the defendant. The appellant will be entitled to his costs of the appeal to the extent of the amount he has succeeded in getting.

Shah, J.:—I agree. I desire to add a word with reference to the argument urged by Mr. Shingne that under Section 55, sub-Section 5, Clause (*b*) of the Transfer of Property Act, the purchaser was not bound to tender and pay the amount due until the completion of the sale. But sub-Section 4, Clause (*a*) of that section provides that the seller is entitled to the rents and profits of the property till the ownership of the property passes to the buyer. The ownership does not pass to the buyer under the Transfer of Property Act until a registered conveyance is executed by vendor.

It is clear, therefore, that the vendor would be entitled to the rents and profits of the property practically until the date of the payment of the money, as no registered conveyance was executed up to the date of

(1) A.I.R. 1918 P.C. 129=43 Bom. 181=45 I.A. 233=21 Bom.L.R. 114=17 A.L.J. 1=29 C.L.J. 138=23 C.W.N. 441=36 M.L.J. 1=9 L.W. 171=1919 M.W.N. 321 (P.C.).

the decree. The interest claimed by the plaintiff in this suit is really in lieu of the rents and profits, to which under the Transfer of Property Act, he is clearly entitled in the absence of any contract to the contrary.

Appeal allowed.

A. I. R. 1922 Bombay 188.

MACLEOD, C. J. AND SHAH, J.

Mahadeo Govind Suktankar—Plaintiff-Applicant

v.

Ramchandra Govind Suktankar and another—Defendants-Opposite-Party.

Civil Extr. Application No. 70 of 1920, decided on 14th June, 1921, from a decree of the Dist. J., Belgaum in Mis. A. No. 10 of 1919.

Civil P. C. (Act V of 1908), S. 16 (e)—Suit for mesne profits—Lands outside British India—But defendant residing within jurisdiction of British Indian Court—Suit in that Court lies—Jurisdiction.

In accordance with the general principles of English Law applicable to India, a suit to recover mesne profits of land situated outside British India can be instituted in British India. Although Section 16 of the Civil Procedure Code does not seem to be applicable to cases of land outside British India there is reason to believe that the whole of the section follows the English Law with regard to jurisdiction in case of suits in which specially the decree could be executed by the personal obedience of the defendant.

[P. 188, C. 2.]

G. S. Nulgaonkar—for Applicant.

D. R. Manerikar—for Opposite-party.

Macleod, C. J.:—The plaintiff filed this suit in the Court of the Assistant Judge at Belgaum to recover mesne profits of certain land for the years 1915-16 and 1916—17. It is admitted that the land is situated in the Kurandward State outside British India, and that the plaintiff bases his claim to mesne profits on the fact that he became entitled to such land by an award decree in 1915 and did not get possession of the lands until 1917. The defendants contended that, as the suit came under Section 16 (*e*) of the Civil Procedure Code the Court had no jurisdiction. This contention found favour with the learned Assistant Judge and also with the District Judge.

Now in the case of land outside British India Section 16 has no application and we have to fall back upon general principles in considering whether this is a suit in which a personal relief is claimed against a defendant residing within the jurisdiction of the Court.

First, it may be as well to clear the ground by disposing of certain contentions which were raised in the course of the argument as to the proper scope of Section 16 of the Civil Procedure Code, sub-Section (*e*) and the proviso to the section. Sub-Section (*e*) excludes from the jurisdiction of the Courts, outside whose local limits the property is situate, suits for compensation for wrong to such immoveable property; and the word "wrong" refers to torts affecting immoveable property such as trespass, nuisance, infringements of easements, &c. The proviso makes it clear that even although a wrong to immoveable property is alleged, yet, where the relief sought can be entirely obtained through the defendants personal obedience, then the suit can be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

So that assuming for the moment that the suit was one for mesne profits relating to land in British India, and the land had been outside the local limits of the jurisdiction of the Court at Belgaum, still if the decree directed something to be done which could be done through the personal obedience of the defendant, such as the payment of money, then the Belgaum Court would have jurisdiction to entertain the suit.

It is admitted that the provisions of Section 16 of the Civil Procedure Code are an embodiment of the provisions of the law of England on this subject. But it seems to have been suggested that the proviso enacted something different. In our opinion there is no reason for thinking that the whole section does not follow the English law with regard to jurisdiction in the case of suits of the nature described in Section 16, and we see no reason to think that under the English law this suit would not lie in the Belgaum Court.

Fortunately the decision of Sir Lawrence Jenkins in *Kashinath* v. *Anant* (1) is directly in point, and from that decision it is clear that the principles enunciated by the English Courts of Equity apply

(1) (1899) 24 Bom. 407=2 Bom. L. R. 47.

to this case. The facts of that case were somewhat similar to these. The plaintiff sued in the Court at Nasik in British India to establish his right to a share in the income derived from certain grants of land situate outside of British India, but received by the defendant within jurisdiction of the Nasik Court; it was held that the suit was within the jurisdiction of the Court, there being no dispute as to title. Sir Lawrence Jenkins said:—

"The lower appellate Court seems to have thought that all property which had a foreign origin was outside the jurisdiction of the Court; this, however, is not a correct view of the law. The general principle is clearly stated by Lord Cottenham in *Ex-parte Pollard*, (2) where he says (pp. 250-251); "If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities."

It is not suggested that the law prevailing in Kurandwad State would not permit of the defendant being directed to pay the mesne profits of the land to the plaintiff to whom the lands belong. There appears to be an equity in favour of the plaintiff that the profits of those lands which were awarded to him in 1915 should not remain in the pockets of the defendant, and, therefore, there is no reason why the Belgaum Court should not have jurisdiction to administer that equity in favour of the plaintiff. We are not concerned here with the merits of the case. We think that the Court in Belgaum had jurisdiction to decide whether, on the facts that were placed before it, mesne profits of those properties should be ordered to be paid by the defendants to the plaintiff.

(2) (1840) Mont. & Chit. 239=4 Duck. 27

The Rule, therefore, must be made absolute. The case must go back to the Court of the Assistant Judge to be dealt with on the merits. The plaintiff will be entitled to his costs in this Court and the Court below. Costs in the trial Court will be costs in the cause.

Rule made absolute.

A. I. R. 1922 Bombay 189.

MACLEOD, C. J. AND SHAH, J.

B. B and C. I. Railway Company—Defendant-Applicant

v.

Dayaram Bechardas—(Manager of the firm of Bechardas Narottamdas)—Plaintiff-Opponent.

Civ. Appl. under Ordinary Jurisdiction No. 279 of 1920, decided on 2nd March, 1921, from decision of 1st Class Sub. J., Broach in Small Cause Suit No. 200 of 1920.

Railways Act, S. 72—Risk Note H—Loss of goods consigned—Plaintiff must prove wilful neglect before burden shifts to company of proving theft in running train.

A consignment of goods handed over to a Railway Company for carriage under risk note, form H, had been short delivered in respect of some complete packages, and the company, when sued, adduced practically all the available evidence.

Held: the plaintiff would have to show that there was wilful neglect before the company would have the liability thrown on them to prove that the loss was due to a theft in the running train. As the Railway Company adduced practically all the available evidence and made a definite suggestion supported by evidence as to robbery from the running train, though it could not be said that the fact is established, yet the theory of wilful neglect on the part of the Railway servants is sufficiently excluded.

[P. 190, C. 2; P. 191, C. 1.]

B. J. Desai—for Applicant.

H. V. Divatia—for Opponent.

Macleod, C. J.:—The plaintiff sued the Railway Company for the loss of six bags of sugar which were consigned from Bombay to Broach. There is no doubt that six bags out of sixteen were delivered short. The consignor plaintiff had signed the risk-note in the form H, so, if the goods were short delivered, he had to prove that the loss was due to wilful neglect on the part of the Railway Company's servants.

Undoubtedly there is often a difficulty in proving wilful neglect, because the only evidence of wilful neglect is the evidence which can be extracted in cross-examination from the witnesses for the defence. The

guard of the train proved that the seals of the wagon were intact at Ankleshwar and also at the Narbada bridge cabin where the train stopped to let Express pass. When he got to Broach he found the seals broken. He re sealed the wagon which was taken off at Broach, but he did not make any report to the Station Master. The Judge finds on that evidence that it was an undisputed fact that the loss of sugar occurred at Broach station. Therefore the plaintiff proved by his evidence that the loss was due to wilful neglect of the Railway employees.

It appears to me that the plaintiff could very easily have proved wilful neglect on the part of the Railway employees, if there had been any, by putting proper questions to the defendants' witnesses. The guard was not cross-examined beyond being asked whether his journal mentioned anything about a theft or robbery, and whether there was any police inquiry about the missing goods.

A great deal of information might have been obtained by further questioning the guard as to the time when the train arrived at Broach, what was the position in the train of this particular wagon, how long after he arrived at Broach he inspected the wagon, and other questions of that sort which would go to elucidate the question whether the theft could possibly have been committed while the train was standing at the Broach station.

It would not be likely that the theft occurred at the Broach station before the wagon was taken off the train. But after the wagon was taken off and stood in the goods-yard, it was quite possible that theft might have taken place. But the evidence of theft having taken place when the wagon was in the goods-yard would depend on the evidence of the goods clerk, as his duty would be to look after the goods which would arrive from the consigning stations, and his evidence would show whether the seal was intact or whether there was any indication that the theft had been committed in the goods-yard. The goods clerk was called as a witness but he was not cross-examined at all. Therefore it may be taken that there is no evidence to show that the theft took place after the wagon was taken off the train.

Then all that is left is that the theft must have taken place either between the Narbada bridge cabin and the Broach station or while the wagon was in the station before it was taken to the goods-yard. It seems to me extremely unlikely that the theft could have been committed after the train reached the station as the risk of discovery would be too great.

There is nothing improbable in it having taken place between the cabin and the station. For the train was detained at the cabin to allow the Express train to pass, and either while the train was standing there or while the train was approaching the Narbada bridge there would be ample opportunity for a thief to get on to it considering that it was pitch-dark night, while after crossing the bridge the train would be going very slowly before reaching the station. Therefore all these possibilities are in favour of the theft having taken place before the train got to the station, and the possibilities of the theft having taken place when the wagon was taken off the train were practically excluded by the fact that the goods clerk was not examined on this point.

It appears to me, therefore, that the plaintiff has failed entirely to throw the liability of the loss on the Railway Company by proving that it was due to wilful neglect of the Railway Company's servants. Strictly speaking, he would have to show that there was wilful neglect before the Company would have the liability thrown on them to prove that the loss was due to a theft in the running train.

I do not think, therefore, that the Judge, although he is right in his law, has properly considered the evidence before him with reference to that law. Therefore, I think that the rule must be made absolute and the suit dismissed with costs.

Shah, J.:—I feel some difficulty in this case, because after all it seems to be a question of fact as to whether the loss was due to the wilful neglect of the Railway servants and whether under the circumstances the reasonable possibility of the loss being due to robbery from the running train is sufficiently excluded. The learned Judge has observed in his judgment with reference to the question of theft from a running train that the fact is not well established.

It seems to me that this finding is rather halting. Apart from that consi-

deration, however, it seems from his judgment that he has not appreciated the importance and the bearing of the evidence regarding the theory of robbery from the running train. There is the evidence of the goods clerk at Carnac Bunder which shows distinctly that this theory of robbery from a running train was put forward by the Railway authorities. The mere fact that the telegram is not produced is not sufficient to negative the importance of that evidence. The goods clerk at the Broach station was not examined in detail by the plaintiff though he was available for cross-examination, and no facts were elicited which would show that the theory was not put forward in time or that it was not reasonable under the circumstances. The evidence of the guard also seems to suggest the same theory.

Though we are slow to interfere with a finding of fact in revision, in this case, I think the finding of the lower Court that the goods were not lost in consequence of robbery from a running train is opposed entirely to the weight of the evidence, which is in favour of that theory. In this case Railway Company has adduced practically all the available evidence and has made a definite suggestion supported by evidence as to robbery from the running train. I do not say that the fact is established; but the theory of wilful neglect on the part of the Railway servants is sufficiently excluded.

I agree, therefore, that the decree of the lower Court should be set aside and the plaintiff's suit dismissed with costs.

Decree reversed.

A. I. R. 1922 Bombay 191.

MACLEOD, C. J. AND SHAH, J.

Barthol Duming Rodriks and others—Applicants

v.

Papa Dada—Opponent.

Cr. Application for Rev. No. 67 of 1921, decided on 10th June, 1921, from an order passed by S. J., Thana.

Criminal P. C. (Act V of 1898), Ss 408 and 413—Cattle Trespass Act, S. 22—Order of compensation is appealable—Compensation is not fine.

An order awarding compensation and repayment of fines under Section 22 of the Cattle Trespass Act (I of 1871,) is appealable under Section 408 of the Cr. P. C.; the compensation so awarded not being a fine, the restrictive provisions of Section 413, Criminal Procedure Code are not applicable. [P. 191, C. 2; P. 192, C. 1.]

S. V. Bhandarkar—for Applicants.

D. R. Patwardhan—for Opponent.

Macleod, C. J.:—The petitioners were convicted by the Sub-Divisional Magistrate, Bandra, under Section 22 of the Cattle Trespass Act, I of 1871, and the complainant was awarded as compensation Rs. 100, together with the fine of Rs. 26-8-0 which he had paid. The learned Magistrate directed that the total amount of Rs. 126-8-0 should be recovered in equal amounts of Rs. 42-2-8 from each of the petitioners.

In appeal to the Sessions Judge the first point which was taken was that there was no appeal. The second point was that if there was an appeal the compensation awarded was really a fine, and the effect of the decision of the Magistrate was that each of the petitioners had been fined Rs. 42-2-8, and therefore, no appeal lay under Section 413 of the Criminal Procedure Code. It is admitted that a person convicted under Section 22 of the Cattle Trespass Act can be said to be convicted of an offence. Therefore an appeal would lie unless the restrictive provisions of Section 413 applied to the case. That question depends upon whether it can be said that compensation awarded to a complainant under Section 22 of the Act is a fine.

We see no necessity why the Court should exert its ingenuity to discover that what is stated by the Legislature to be compensation, which is one thing, is to be included within the term "fine" as laid down in the Penal Code and other penal Statutes, which is another thing. It is quite true that a person who is ordered to pay compensation, and pays it, is out of pocket to the extent of the amount paid, and the person who is ordered to pay a fine, and pays it, is also out of pocket to the extent of the fine, but it does not follow that the nature of the penalty exacted is the same.

It is quite true that under Section 23, the compensation which is awarded under Section 22 should be recovered in the same way as a fine There again the method of recovery has nothing whatever to do with the nature of the penalty, and in this respect it may be remarked that there is no provision under which the Court can give a sentence of imprisonment in default of the compensation not being paid. If the Legislature had intended that compensation awarded

under Section 22 of the Cattle Trespass Act was to be treated exactly in the same way as a fine for the purpose of considering whether the sentence was appealable or not, then the Legislature could easily have said so, and there is no reason why we should go out of our way in order to remedy the defect, if it is one.

An appeal lies against a conviction under Section 408, and in my opinion, the Sessions Judge was wrong in deciding that Section 413 of the Criminal Procedure Code applied. There is, therefore, no necessity to consider the point that, although the amount of compensation awarded to the complainant against all the petitioners was over Rs. 50, because each petitioner was liable to pay under Rs. 50, therefore it could be said that each petitioner had been fined less than Rs. 50.

I think the Rule must be made absolute and the appeal must go back to the Sessions Judge to be dealt with according to the merits.

Shah, J. :—I agree.

Rule made absolute.

A.I.R. 1922 Bombay, 192.

MACLEOD, C. J. AND SHAH, J.

Baiku Sidu Kumbhar and others—Defendants-Appellants

v.

Vyankatesh Vaman Deshpande—Plaintiff-Respondent.

S. A. No. 48 of 1920, decided on 8th April, 1921, from a decision of Asst. J., Satara in No. 351 of 1918.

Vatan—Alienations of Inami *and* Mirasi *rights—No evidence to show that* Mirasi *rights were acquired independently by* Vatandar *—Alienation whether by* Vatandar *or by Court is inoperative beyond the life-time of* Vatandar.

Where there is no evidence to show that the *Mirasi* rights were independently acquired by the original *Vatandar* and the lands according to the record, such as it is, are treated as *Vatan* lands, the alienation of *Mirasi* rights cannot be saved when the lands are sought to be resumed on the ground that the alienation of *Inami* rights has ceased to be operative after the life-time of the original *Vatandar*. Whether the alienations are of the *Inam* rights or of the *Mirasi* rights they are operative only during the life-time of the *Vatandars* whose right, title and interest were alienated and therefore, after their deaths, the successor is entitled to the possession of the lands in question, (1919) 44 Bom. 237=22 Bom. L. R. 275=56 I. C. 411, followed.

[P. 192, C. 2; P. 193, C. 1]

Munshi with *H. B. Mandavale* and *M. H. Metha*—for Appellants.

Coyaji with *K. N. Koyajee*—for Respondent.

Shah, J.:—These appeals (Second Appeals Nos. 927, 928, 940, 941, 950 of 1919 and 48, 103, 129, 319, 320, 321 and 322 of 1920) relate to the alienations either of the *Inami* or *Mirasi* rights of the *Vatandar*. The plaintiff is the successor of the original *Vatandars* whose right, title and interest were either sold at Court-sales or by private transfers. The plaintiff claims to recover possession of these lands on the ground that these are *Vatan* lands and that the alienations have ceased to be operative after the life-time of the original *Vatandars*.

The lands in question have been found to be *Vatan* lands. It is clear that the alienations made after Regulations XVI of 1827 came to be applied to the District of Satara would not be operative beyond the life-time of the *Vatandar*.

All these alienations except one were effected during the years 1863—74, *i.e.*, after the Regulation XVI of 1827 was made applicable to this district and before the Bombay Hereditary Offices Act (III of 1874) came into force. It is also found by the lower appellate Court, and there is no reason to doubt the correctness of the finding, that the settlement of this *Vatan* was made on the lines of the Gordon Settlement; and the provisions of the settlement point to the same conclusion though not in terms.

It is clear from the decision in *Appaji Bapuji* v. *Keshev Shamrav* (1) that the alienations of such lands, whether affected by the Court or by the *Vatandar* himself are inoperative beyond the life-time of the *Vatandar*. It is not seriously disputed that so far as the *Inami* rights in the lands are concerned, the alienations have ceased to be operative. But the only ground upon which some of the appeals, in which the alienations of the *Mirasi* rights are involved, are sought to be saved is that though the alienations of the *Inam* rights in the *Vatan* lands may be inoperative there is no reason to extend the restriction on the power of alienation to

(1) (1890) 15 Bom. 13.

the *Mirasi* or occupancy rights unless it be shown that such rights formed part of the grant.

Assuming without deciding that such a distinction is permissible in the case of *Vatan* lands, there is no evidence in this case to show that the *Mirasi* rights were independently and separately acquired by the original *Vatandar*. The record, such as it is, shows that the lands were treated as *Vatan* lands. No *Sanad* is produced in the case. Beyond the fact that these lands are *Vatan* lands, who have no information as to the terms of the settlement with reference to these lands which could throw any light on the question as to whether the *Mirasi* rights were independently acquired originally by the *Vatandar*.

In the absence of any such evidence it is clear to my mind that the distinction sought to be made in the appeals, in which the alienations of the *Mirasi* rights are involved, cannot be maintained. No case has been cited to us in the course of the argument in which the ordinary presumption which applies to the *Inams* and *Jagirs* has been extended to the *Vatan* lands; and the accuracy of the observations in *Amrit Vaman* v. *Hari Govind* (2) wearing on the point with reference to the *Vatan* lands has not been challenged on behalf of any of the appellants in these appeals.

I am, therefore, of opinion that the lower appellate Court was right in holding that, whether the alienations were of the *Inam* rights or of the *Mirasi* rights, they were operative only during the life-time of the *Vatandars* whose right, title and interest were alienated and that therefore, after their deaths, the successor was entitled to the possession of the lands in question. I would, therefore, dismiss all the appeals preferred on behalf of the alienees with costs.

As regards Appeal No. 129 of 1920 preferred by the plaintiff, he has not been able to show that the alienation in question was made after the Regulation of 1827 came to be applied to the district. In the absence of any restrictive provisions against alienations applicable to the particular alienation it is clear that the alienation is binding upon the successor of the *Vatandar*; and it must be taken to be on the same footing as an alienation by the owner of his ordinary immoveable property. That appeal also must be dismissed with costs.

Macleod, C. J.:—I agree.

Decree confirmed.

(2) (1920) 44 Bom. 237=56 I.C. 411=22 Bom. L. R. 275.

A. I. R. 1922 Bombay 193.

MACLEOD, C. J., AND SHAH, J.

Manaji Kaverji—Appellant.

v.

Aramita—Respondent

O. C. J. Appeal No. 9 of 1921 and Suit No. 733 of 1913, decided on 21st June, 1921, against the decision of Pratt, J.

Civil P. C. (Act V of 1908), O. XXI, R. 89—Auction sale—Deposit in Court of the amount realised by sale with an undertaking to pay in full is not a valid deposit.

Within thirty days from the date of the sale the applicant, who applied to have the sale set aside, brought into Court not the amount for the recovery of which the sale was ordered but only the amount realised by the sale *plus* five per cent. with an affidavit stating that he was unable to ascertain from the particulars and conditions of sale the full amount of the decree and that he would pay the same into Court the moment it was calculated and ascertained.

Held: the applicant had not complied with the provisions of Order XXI, Rule 89 and the part-payment of the amount due to the decree-holder with an undertaking to pay the balance does not amount to a deposit within the meaning of the Rule. The provisions of Order XXI, Rule 89 are a concession allowed to judgment-debtor and they must be strictly complied with in order to enable the judgment-debtor to obtain the advantage of the concession. [P. 194, C. 1,]

Desai—for Appellant.

Coltman—for Respondent.

Macleod, C.J.:—On the 10th January, 1918 the 1st defendant as mortgagor was ordered to pay into Court Rs. 1,20,497 and interest and costs when taxed for payment to the plaintiff and other defendants who were mortgagees. Default having been made in payment, a decree absolute for sale was made on the 17th June, 1918, and two of the mortgaged properties belonging to the first defendant were directed to be sold and the net proceeds to be applied towards the satisfaction of the decretal amount. The sale was held on the 5th August, 1920 and the auction-purchaser was the

eighth defendant, De Souza.

On the 29th day after the sale, *i.e.*, the 4th September, 1920, the first defendant brought into Court Rs. 98,000 *plus* 5 per cent. with an affidavit stating "as no amount was specified in the particulars and conditions of the sale as that for the recovery of which the sale was ordered, I am unable to ascertain the full amount of the decree and to pay the same into Court with this application. The moment it is calculated and ascertained I will pay the same into Court."

Notice was then issued to the judgment-creditors and the auction-purchaser to show cause why the sale should not be set aside. The purchaser opposed the notice contending that the 1st defendant had not complied with the provisions of Order XXI, Rule 89. That was perfectly clear from the admitted facts of the case. But it was contended that a part-payment of the amount due to the decree-holder, with an undertaking to pay the balance, amounted to a deposit within the meaning of Rule 89 of Order XXI, and that, therefore, the person giving the undertaking was entitled to an order setting aside the sale.

Now an undertaking to pay a certain amount is not payment, and, as has been laid down in previous decisions, the provisions of Rule 89 are a concession allowed to judgment-debtors, and they must be strictly complied with in order to enable the judgment-debtor to obtain the advantage of the concession. If part-payment coupled with an undertaking to pay the balance were to be considered as payment in full, then the provisions of the rule would not be complied with.

So the decision of the trial Judge was correct and the appeal must be dismissed with costs to the 8th defendant.

Appeal dismissed.

A. I. R. 1922 Bombay 194.

MACLEOD, C. J. AND SHAH, J.

Sitabai Zukappa Mhetre—Plaintiff-Appellant

v.

Keshavrao Parvatrao Kate—Defendant-Respondent.

L. P. A. No. 18 of 1921, decided on 2nd December, 1921, from the decision of Pratt, J. in A. No. 32 of 1921.

Limitation Act, Art. 182—Instalment decree—Application for recovery of one of several instalments due is step-in-aid with regard to whole decree.

An application for partial execution of a decree would be a step-in-aid with regard to the whole decree. There is a considerable difference between a decree which directs several things to be done by the defendant without specifying any particular date or dates for their performance, and a decree which directs instalments to be paid on particular dates; but a Darkhast, which asks for the assistance of the Court for the recovery of one of several instalments at the date of Darkhast, should be considered as a step-in-aid so as to start a new period of limitation with regard to all the instalments then due. [P. 195, C. 1.]

Coyajee, with *J. R. Gharpure*—for Appellant.

V. D. Limaye—for Respondent.

Macleod, C. J.:—The plaintiffs in this suit got a decree on the 24th July, 1908 for Rs. 6,693 with interest on Rs. 6,500 at twelve annas per cent. per mensem. The decree was made payable by instalments of Rs. 1,000 each. The first instalment was to be paid at the end of *Ashad, Shake* 1831 corresponding with July, 1909. Apparently nothing further was done by the plaintiffs although no instalments had been paid under the decree until the 7th of April 1914 when an order was made making the decree final for the sum become due. It is strange that that order was made as it was absolutely unnecessary. But it has been made, and, therefore, it must be considered that that order kept the decree alive.

In December 1915 the first Darkhast was filed. At that time all the instalments payable under the decree had become due. But we have not been told to what instalments the Darkhast related. The Judge says that that Darkhast fell through on account of the plaintiffs' laches. But it is admitted that the two instalments for 1909, 1910, with interest had been paid.

The next Darkhast was filed in November, 1918 to recover the instalments which fell due in 1911, 1912 and 1914. The Judge said that that Darkhast was evidently time-barred, and it would

be so unless the Darkhast of 1915 could be considered as a step-in-aid of execution with regard to the instalments which were sought to be recovered in the Darkhast of 1918. However that may be, execution proceeded under the Darkhast of 1918 and recoveries were made.

It appears from the Darkhast that the instalments for 1914, 1915, were first entered in it, but were afterwards struck out, so that the Court did not pass any order with regard to those instalments by which the plaintiffs' right to recover them was reserved.

The present Darkhast was filed in 1919 to recover the instalments for 1914, 1915. Those instalments were clearly barred at the date of the Darkhast, unless the previous Darkhast of 1918 could be considered as a step-in-aid in respect of all the instalments then, due, and a point arises for which we can find no direct authority.

We have been referred to the decision in *Nepal Chandra Sadookhan* v. *Amrita Lall Sadookhan* (1), where the decree directed not only that possession should be given by the execution-debtor but also that he should pay costs. The plaintiff first sought execution with regard to the costs, reserving his right to execute the decree for possession, and three years later when he sought execution of the decree for possession he was met with the contention that he ought to have done so when he executed the decree for costs.

But this contention was disallowed on the ground that an application for partial execution of a decree would be a step-in-aid with regard to the whole decree. No doubt there is a considerable difference between a decree which directs several things to be done by the defendant without specifying any particular date or dates for their performance, and a decree which directs instalments to be paid on particular dates; but we see no reason why a Darkhast, which asks for the assistance of the Court for the recovery of one of several instalments due at the date of the Darkhast, should not be considered as a step-in-aid so as to start a new period of limitation with regard to all the instalments then due.

In our opinion the appeal should be allowed and the Darkhast should proceed with costs throughout.

Appeal allowed.

(1) (1899) 26 Cal. 888.

A.I.R. 1922 Bombay 195.

MACLEOD, C. J. AND SHAH, J.

Gumanji Dhiraji Marwadi—Plaintiff-Appellant

v.

Vishvanath Parbhu Hingmire—Defendant No. 1-Respondent.

S. A. No. 744 of 1920, decided on 15th July, 1921, from a decision of Asst. J., Satara, in A. No. 18 of 1920.

Execution—Decree varied in appeal—Defendant not party to appeal affected—Executing Court cannot go behind the decree.

A mortgage-decree was passed against A and B making the property of B primarily liable for the decree amount. B appealed against the decree without making A party thereto and the decree was varied by realising the liability of B's property when the decree-holder thereupon began to execute the decree against A's property. A objected saying that he was not bound by the appellate decree and that B's property must be sold first.

Held: As A took no steps to get the order of the appellate Court set aside the only decree that could be executed was the decree which directed that properties other than property of B should be sold in default of payment of decretal amount. It is not for the executing Court to enter into the merits or demerits of a decree. Its only functions are to carry out the directions of the Court.

[P. 196, C. 2; P. 197, C. 1.]

P. B. Shingne—for Appellant.

V. D. Limaye—for Respondent.

Macleod, C. J.:—One Parbhu mortgaged four properties to Gumanji Dhiraji for Rs. 275 on the 15th September, 1903. Gumanji filed a suit No. 340 of 1914 against Parbhu's son and four others to recover Rs. 539-8-0 due under the mortgage and obtained a decree which provided that the defendants Nos. 3 to 5, who apparently made themselves personally, responsible for the debt, should pay the amount claimed with costs of the suit, to the plaintiff within six months; that, if they failed to do so, then the amount

should be recovered by sale of the property No. 3 and that, in case the amount realized by the sale of the said property should be found insufficient, then the plaintiff was at liberty to seek relief under Section 15-B, Clause (2) of the Dekkhan Agriculturists' Relief Act for bringing the other properties to sale for the satisfaction of the deficit amount. The 2nd defendant was impleaded because the debt was said to have been incurred for his benefit by the father of defendant No. 1, and his property No. 3, was primarily made liable for the decretal amount.

We have not got the decision of the Subordinate Judge who tried that suit before us, and so we are unable to say why property No. 3 belonging to defendant No. 2 was primarily made liable for the decretal amount, and not equally together with other properties which Parbhu had mortgaged. The 2nd defendant appealed from the decree, making the plaintiff the only respondent, and the appellate Court amended the decree by setting aside the order of the lower Court against defendant No. 2 and against property No. 3. The reason for that decision was that no part of the mortgage-debt had been raised for the benefit of the 2nd defendant, therefore the mortgage was not binding on property No. 3.

Naturally that decision would affect the interest of the 1st defendant, and it is certainly remarkable that the appellate Judge should not have noticed that, and should not have insisted upon having defendant No. 1 added a party respondent. However, the fact remains that without hearing the 1st defendant the appellate Court varied the decree of the trial Court in a way which affected the interests of the 1st defendant.

The plaintiff sought execution of the decree, when the 1st defendant contended that as he was not a party to the appeal it could not bind him, and he was, therefore, entitled to insist upon the plaintiff first recovering his debt from the sale proceeds of property No. 3. The Subordinate Judge, however, directed that execution should proceed and that the Darkhast be sent to the Collector for sale of the property.

In appeal to the Assistant Judge that order was varied. The effect of the order passed was that property No. 3 should be valued and that value should be deducted from the decretal amount and that execution should proceed against the other properties only to the extent of the balance. That certainly would tend to most extraordinary results. If the value of property No. 3 was more than the decretal amount, the result would be that the plaintiff would lose the whole of his money.

The learned Judge seems to rely upon the decision in *Gajraj Mati Tiwarin* v. *Swami Nath Rao* (1). But the facts there were entirely different. The appellant before that Court had a decree in the trial Court passed against her *ex parte*. Her sons who were defendants with her appealed, but they did not make their mother a party to the appeal. The mother, twelve years after the decree of the High Court, filed an application in the Court of the Subordinate Judge alleging that she had no knowledge of the suit and praying that the *ex parte* decree should be set aside. The Subordinate Judge held that as the decree had been confirmed by the High Court, that Court only had power to entertain the application and consequently rejected it. The High Court decided that the proper Court to which the application should be made was the Court which passed the decree and not the Court which modified that decree or dealt with it in appeal. That was the only point, so far as I can see, which was decided in that case, and it is no authority whatever for the decision of the learned Assistant Judge in this case.

Applying the decision in that case, the 1st defendant had a grievance against the appellate Court which decided an appeal which was against his interest without hearing him, and he should then have applied to that Court to set aside the order and deal with the appeal afresh after hearing his contentions. As the 1st defendant did not apply to the appellate Court, then it is quite clear that the Court executing the decree could not entertain any application to alter the terms of the decree.

We have more than once decided that it is not for the execution Court to enter into the merits or demerits of the decree. Its only functions are to carry out the directions of the

(1) (1916) 39 All. 13=36 I. C. 307=14 A. L. J. 853.

Court. Therefore as the 1st defendant had taken no steps to get the appellate order set aside, the only decree that could be executed was the decree which is now before us which directs that the properties other than property No. 3 should be sold in default of payment of the decretal amount.

The appeal, therefore, must be allowed and the order of the Subordinate Judge restored with costs throughout.

Shah, J.:—I agree.

Decree reversed.

A. I. R. 1922 Bombay 197.

PRATT, J.

Sugan Chand Savaichand and others—Plaintiffs v.

Motilal Durgaprasad and others—Defendants.

O. C. J. Suit No. 3635 of 1920, decided on 16th July, 1921.

Bombay Rent Act, S. 9—Lease—Sub-lease—Rights of sub-tenant when the lease terminates, also terminate.

The term "tenant" in Section 9 does not include a sub-tenant. The sub-tenants hold on a precarious title and when the tenancy under the head lease terminates their right to possession terminates too. Unlike trespasser they come in by right but like trespassers they hold over without right, and they are in the same position as trespassers. [P. 198, C. 1.]

Kamdar—for Plaintiffs.

Coltman, Taleyarkhan and *Khergamvala*—for Defendants.

Pratt, J.:—Plaintiffs are the owners of a building at Vithalwady and let the first floor to Ramjilal Ramswarup on the 15th November, 1917 at a rental of Rs. 40 per mensem.

Plaintiffs say that Ramjilal Ramswarup's rent was in arrears and he had sub-let the premises contrary to the terms of his lease. Therefore, they gave notice terminating the tenancy on the 10th November, 1920.

In the meantime, however, on the 26th October, 1920, Ramjilal Ramswarup was adjudicated insolvent and left Bombay. On 28th October, 1920, the Official Assignee's auctioneers wrote that they had taken away Ramjilal Ramswarup's moveables and vacated the premises. The plaintiffs went there that day. Plaintiff No. 3 says he found defendants in possession of two rooms and that he locked the other two.

On 29th October, 1920, the Official Assignee sent a notice of his intention to disclaim the leasehold, and on 7th December, 1920 the Official Assignee disclaimed tenancy as from that date. Squabbles about possession between the plaintiffs and defendants went on, which led to proceedings in the Police Court. Plaintiff filed this suit on 17th December, 1920.

There is now no question as to Ramjila Ramswarup's occupation. He has vacated the premises and his tenancy has terminated. The suit is against the defendants who claim to be sub-tenants of Ramjilal Ramswarup.

Now the effect of the insolvency was not to terminate the tenancy but to vest the leasehold in the Official Assignee. The locking up of the rooms by the plaintiffs on the 28th October was not a re-entry by the landlord, for the lease gives no power of re-entry. Plaintiffs were then only taking action for the protection of their property. The disclaimer on the 7th December, although it operated to relieve the Official Assignee of personal liability to pay rent as from the date of adjudication, did not operate on leasehold interest until the date of disclaimer, *i.e.*, the 7th December. But before that date the tenancy had been determined by notice, Exhibit 2, on the 10th November, 1920. This notice is proved and is admitted by the defendants in their letter of the 29th October, Exhibit 10.

If the tenancy had been terminated by the disclaimer, the sub-tenants rights could have been saved by Section 62 of the Presidency Town Insolvency Act, or by Section 116 of the Transfer of Property Act. But as it is the tenancy was terminated by notice on the 10th November, 1920, and, therefore, the defendants were tenants on sufferance after that date.

Mr. Coltman contends that even though the defendants are sub-tenants, they are entitled to the protection of the Bombay Rent Act, first, because the word 'tenant' in Section 9 includes a sub-tenant; and, secondly, because under Section 9 (3) the fact, that the landlord's interest has terminated, is not in itself deemed to be a sufficient cause for dispossession. The term 'tenant' is defined in Section 2 (*d*) as "any person by whom or on whose account rent is payable for any premises, and includes every person from time to time deriving title under a tenant."

Granting that the sub-tenant derives title from the tenant, still he is not with-

in the definition unless rent is payable by him or on his account to the landlord. But this is not the case, for there is no privity of contract between him and the landlord. Even if he pays the tenant's rent under the head lease, he does so as the agent of the tenant and not on his own account. The term 'tenant' in Section 9 does not include a sub-tenant, unless of course the suit is filed by the tenant on the under-lease, in which case the tenant is the landlord *qua* the sub-tenant and the sub-tenant is his tenant.

As to the other branch of the argument, the termination of the landlord's interest refers to cases of assignment of the lessor's interest and perhaps even to the death of a Hindu widow lessor. In either case the assignee or the remainder man succeeds to the estate and in the case of the assignee becomes landlord by derivative title. But granting that the tenant derives title from the landlord, he is not for that reason within the definition unless he is entitled to receive rent under the headlease. He is not entitled to receive rent from the sub-tenant because there is no privity of contract between the head lessor and the sub-tenant.

He is, therefore, not the sub-tenant's landlord *qua* the head lease. The extinction of a tenant's title, therefore, does not bring the case within Section 9 (3); and in truth the defendants are not sued as tenants or by a landlord.

The defendants as sub-tenants hold on a precarious title and when the tenancy under the head-lease terminates, their right to possession terminates too. Unlike trespassers they come in by right but like trespassers they hold over without right, and in this suit they are in the same position as trespassers. It is, therefore, not necessary to find on the issue as to reasonable and *bona fide* requirement, or indeed on the issue as to the number of rooms which were sub-let to them.

The plaintiffs have given false evidence when they pretend ignorance of the sub-tenancy. For, I believe they received Ramjilal Ramswarup's rent from the defendants from February to August and even made repairs on defendants' requisition last rains. On the other hand, defendants have behaved no better for they set up at one time a false case of an agreement of direct tenancy from the plaintiffs, which has been subsequently abandoned.

Therefore, following the ordinary rule, I think this is a case in which costs should follow the event.

Decree, therefore, that the defendants do give vacant and peaceful possession of the premises in suit to the plaintiffs and pay compensation at the rate of Rs. 35 per month from 11th November, 1920 till date of delivery of possession. Defendants to pay plaintiffs' costs of this suit.

Suit decreed.

A. I. R. 1922 Bombay 198.

MACLEOD, C. J. AND SHAH, J.

Vinayak Dattatraya Joshi and others—Defendants-Appellants

v.

Ganesh Anant Hasabnis and others—Plaintiffs-Respondents.

S. A. No. 835 of 1918, decided on 6th July, 1921, from a decision of Asst. 1st Class Sub-J., A. P. of Satara in A. No. 92 of 1917.

Bombay Land Revenue Code (1879), S. 81—Registered occupant failing to pay assessment—Action taken by Collector under section—Co-sharer paying up and Khata *transferred in his name—Registered occupant does not lose his occupancy rights.*

The plaintiff who was registered occupant of certain lands, failed to pay assessment on the land and on action being taken under Section 81 plaintiff's co-sharer paid up the arrears due and his name was put in the *khata* of the land. The plaintiff sued to recover possession of the land from the defendants who contended that the plaintiff had no title to sue as his interest was forfeited by the action taken under Section 81.

Held; Though under Section 81 plaintiff's interest as a registered occupant had ceased yet he had occupancy rights in the land and therefore he had a right to sue. [P. 199, C. 1,]

K. N. Koyajee—for Appellants.

S. R. Bakhale and *P. B. Shingne*—for Respondents.

Macleod, C. J.:—A curious point arises in this second appeal upon which there does not appear to be any authority. The facts are that the plaintiff's father obtained possession of the plaint lands on the 5th March, 1895 in execution of an award decree. He then obtained a registered rent-note from one Dnanu Aba on the 22nd July, 1895. In July, 1897 he brought a possessory suit against Dhanu and

got a decree for possession in August, 1897. The plaintiff remained in possession of the land until 1904 and paid assessment. Then the Judge says that the plaintiff was dispossessed by the first defendant in 1904. How he was dispossessed does not appear. But in 1904-05 the Collector took action under Section 81 of the Bombay Land Revenue Code as the plaintiff failed to pay assessment for that year.

There was a mutation of the *Khata* of the plaint lands into the name of Shahaji Gondaji who was the plaintiff's co-sharer in the property, on his paying up the arrears due. It was not mentioned in the order that the Collector was acting under the powers granted to him by Section 81, but it seems fairly obvious that he was acting under that section. The learned Judge held that the Collector then forfeited the registered occupant's interest and not his ordinary occupancy rights in the land.

The present appellants, defendants Nos. 6 to 9, who claim through the original first defendant, claimed that the plaintiff's interest in the land was entirely forfeited in 1904, and, that, therefore, as they are in possession, the plaintiff not being able to sue on title must fail. But it must be admitted that the plaintiff had title in 1904, and we cannot find anything in Section 81 to show that, if the Collector takes action under that section, and instead of selling or otherwise disposing of the occupancy rights, forfeits only the registered occupant's interest, the occupancy rights are also forfeited. Where do they go to? The Collector does not sell or otherwise dispose of them. He merely removes the registered occupant's name from the *Khata* and substitutes the name of somebody else who was already interested in the occupancy.

In this case Shahaji Gondaji, the co-sharer of the plaintiff, became the *Khatedar* responsible to the Government for the assessment. He will be entitled to collect the proper share of assessment from the plaintiff, and if the plaintiff fails to pay, then he can take action under Section 86. But the plaintiff's title remained. It was not sold, it was not disposed of; and, therefore, it is a case of a trespasser coming into possession of and, the owner of which would have twelve years within which to sue to assert his title and recover possession.

We think the judgment of the lower appellate Court was right and the appeal must be dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 199.

MACLEOD, C. J. AND SHAH, J.

Dharamdas Kaushalyadas—Defendant-Appellant

v.

Ranchhodji Dayabhai and others—Plaintiffs-Respondents.

S. A. No. 558 of 1920, decided on 24th June, 1921, from a decision of the Dist. J., Surat in A. No. 57 of 1919.

(a) *Civil P. C., O. VI—Pleadings—Suit for right of way—Relief based on ownership or in the alternative, user—Defendant claiming ownership—Relief on the ground of user can be given—Practice.*

Where the defendant contended that the case of easement could not be made out where plaintiffs put forward an allegation of ownership and the evidence in the case made it clear that the plaintiffs were using the dispute lane as a means of access to their survey number;

Held, the real issue in the case was whether the plaintiffs had enjoyed for the statutory period the right of way over the strip in dispute. The Court was entitled to accept the defendant's contention that the lane belonged to him but that would not prevent the plaintiffs from asking the Court to protect their user of the lane. [P. 200, Cs. 1,2.]

(b) *Practice—Pleadings in Mofussil Court—Technical defect—Pleadings not to be read strictly.*

It is not the duty of the High Court to read pleadings in the Mofussil Courts as strictly as they would be read if they were filed in the Chancery Division of the Supreme Court. The High Court has a much larger range of vision, and the plaintiffs' case cannot be defeated merely on the ground of some technical defect in their pleadings, provided on the real issues in the case they succeed. [P. 200, C. 1.]

Coyajee with *G. N. Thakor*—for Appellant.

G. S. Rao with *H. V. Divatia*—for Respondents.

Macleod, C. J.:—The plaintiffs sued for a permanent injunction directing the defendant to remove the posts and wire-fencing from the lane in dispute causing obstruction to the plaintiffs' user of the same. The plaintiffs' suit has been decreed in both the lower Courts, and it is sought now to get those decisions reversed on a purely technical objection.

The plaintiffs are the owners of Survey No. 56 on the map, while the defendant is the owner of Survey No. 57. Towards the southern boundary of Survey No. 57 is a hedge maintained by the defendant, and it might be presumed that that at any rate was the limit of the land of which he was making use. On the south of the hedge was the strip of land in dispute. On the other side of that was Survey No. 58.

The plaint admittedly is not very scientifically drawn, as is often the case. It might well be urged that the plaintiffs contend in their plaint that Survey No. 58 or at any rate the disputed strip, belonged to them either by title or by adverse possession, and that, therefore, they claimed the user of this strip on their own title, and consequently sought an injunction against the defendant disturbing possession. But in paragraph 10 of the plaint it is suggested that "the defendant asserts his land to be in the said *sher* of ours but the said assertion is not true. And even if it be true, he may be treated as having given up his boundary hedge in our favour, and by reason of our adverse possession and enjoyment of the said *sher* for 40 years, he cannot now shift his hedge to the extent even of an inch and he has no right to do so and is estopped from doing so."

That might well be redrafted by a skilled practitioner so as to claim in the alternative that if this disputed strip is within the boundary of Survey No. 57, it has either been given up by the defendant, or at any rate the plaintiffs have been using the strip for such a period that the law would protect that user and prevent the defendant from obstructing it.

The evidence in the case makes it perfectly clear that the plaintiffs have been using this strip as a means of access to their Survey No. 56. At the very most, therefore, we might order the plaintiffs to remedy the technical defects in their case by amendment of the pleadings. But, as has often been pointed out, it is not the duty of this Court to read pleadings in the District Courts as strictly as they would be read if they were filed in the Chancery Division of the Supreme Court. We have a much larger range of vision, and the plaintiffs' case cannot be defeated merely on the ground of some technical defect in their pleadings, provided on the real issues in the case they succeed.

The real issue in this case is whether the plaintiffs have enjoyed for the statutory period the right of way over the strip in question. Whether in previous years they merely exercised rights of way over that strip against the true owner, or did so because they thought it had belonged to their ancestors, it does not seem to me to make very much difference. They have enjoyed the rights to that strip, the defendant has obstructed them. They are entitled to accept the defendant's contention that the strip belongs to Survey No. 57. That would not prevent them from asking the Court to protect their user of that strip.

The defendant's case, therefore, in appeal, resting on purely technical objections to the decisions of the Courts below, I think we are entitled to take a broad view of the question and confirm those decisions. The appeal will be dismissed with costs.

Shah, J. :—I agree. I only desire to add that in both the lower Courts the case has been tried on the footing that the plaintiffs claim by way of easement the right of way over a strip of land which, according to the defendant, forms part of his land. It is no doubt true that in the plaint the plaintiffs put forward the case of ownership over this land and generally speaking that would not be consistent with the case of their having acquired an easement over that land. But the case has been tried on the footing of an easement and it has been made clear before us by the admission of Dewan Bahadur Rao for the plaintiffs that they accept the position taken up by the defendant that this strip of land forms part of his land.

It is, therefore, unnecessary to consider the merits of the contention urged on behalf of the defendant, that the case of easement cannot be made out where the plaintiffs put forward an allegation of ownership over that piece of land.

——— *Decree confirmed.*

A. I. R. 1922 Bombay 200.

MACLEOD, C. J. AND SHAH, J.

Haranbhai Jivabhai and others—Plaintiffs-Appellants. v.

Collector of Kaira—Defendant-Respt.

F. A. No. 158 of 1918, decided on 13th July, 1921, from the decision of District J., Ahmedabad, in Suit No. 52 of 1918.

Gujrat Talukdars' Act (Bom. Act VI of 1888), S. 29—B.—Mortgage by Talukdar—Sub-mortgage by mortgagee—Failure to notify claim.

Where the mortgagee of *talukdari* rights and the sub-mortgagees to whom the mortgagee's rights were mortgaged by the mortgagee's heirs failed to notify their claim when the *talukdari* settlement officer called upon creditors to notify their claims and where therefore the sub-mortgagees, the plaintiffs, who were ejected, sued to recover possession on the ground that it was not their duty to notify their claim.

Held: In spite of the provisions of Section 29-B one of the representatives of the original mortgagee who was a minor was entitled to claim against the Talukdar and therefore plaintiffs were entitled to sue in spite of their failure to notify their claim. As long as the mortgagee's rights were in existence the plaintiffs could sue the mortgagee for all those rights which the mortgagee would be entitled to claim against the mortgagor and they were entitled to remain in possession as long as the mortgagee who was their mortgagor could claim his mortgage rights against the Talukdar.

Koyajee and *G. N. Thakur*—for Appellants.

N. K. Mehta—for Respondents.

Macleod, C. J.:—The plaintiffs filed this suit to recover possession of the plaint property with Rs. 100 for damages for crops. Their claim to recover possession was disallowed by the learned District Judge, and they were only given a decree for Rs. 100. The plaint property belonged originally to the Talukdar of Dehwan. But it was not strictly speaking *Talukdari* land but *Sanadia* land situated in the village of Ras which happened to belong to the Talukdar.

The question might arise whether the provisions of the Gujrat Talukdars' Act VI of 1888 would apply to such land. But that question need not be considered because on other grounds we think the plaintiffs are entitled to recover possession. The lands were mortgaged by the Talukdar to one Bapu Hira. Bapu Hira died and his heirs mortgaged their mortgage rights in these and other lands to the present plaintiffs. When the *Talukdari* estate came into the possession of the Talukdari Settlement Officer as manager in 1905, that officer called on the creditors of the estate to notify their claims. The plaintiffs though not creditors of the *Talukdari* estate would certainly be interested in their debtor, who was a creditor, notifying his claim to the Talukdari Settlement Officer. But neither the plaintiffs nor their debtors, the original mortgagees, notified the claim. If there had not been a question that the representative of the original mortgagee, or one of the representatives, was a minor, then we should have to consider whether the Act applied to these private lands. But the Judge has found that one of the representatives of the original mortgagee, Bapu Hira, was a minor and was still a minor, so that on account of his minority he will still be entitled to claim against the Talukdar in spite of the provisions of Section 29-B of the Gujarat Talukdars' Act.

But the learned Judge has dismissed the plaintiffs' claim to possession on the ground that the question between the minor mortgagee and the Talukdar does not arise in the plaintiffs' suit, and that as between the Talukdar and the plaintiffs it was the duty of the plaintiffs to notify this claim against the property and as they have not done so they are not protected in respect of their sub-mortgage. That, I think, was a wrong conclusion because the plaintiffs claimed under the mortgagee, and as long as the mortgagee's rights are in existence the plaintiffs can sue the mortgagee for all those rights which the mortgagee will still be entitled to claim against the mortgagor, and they are entitled to remain in possession as long as the mortgagee, who is their mortgagor, can claim his mortgage rights against the Talukdar.

The appeal, therefore, must be allowed, and in addition to the decree for Rs. 100 for damages, there must be a decree in favour of the plaintiffs to recover possession of the plaint property, with costs throughout. There must be an inquiry as to mesne profits from the date of suit until possession is restored or three years from to-day.

Shah, J.:—I agree.

Appeal allowed.

A. I. R. 1922 Bombay 201.

MACLEOD, C. J. AND SHAH, J.

Vithaldas Bhagwandas—Plaintiff-Appellant

v.

Murtaja Husein—Defendant-Respondent.

First Appeal No. 346 of 1920, decided on 21st December, 1921, from the decision of 1st Class Sub.-J., Bijapur in

suit No. 69 of 1916.

Dekkhan Agriculturists' Relief Act, Ss. 12 and 13—Suit on mortgage—Accounts showing larger amount due than that due on bond—Larger amount will not be decreed.

Where in a suit brought for the recovery of the instalments found due under a mortgage instalment bond the account is taken by the Commissioner under the Agriculturists' Relief Act, showed that the defendant owed a far larger amount than that due under the bond.

Held : that a larger amount than found due under the bond itself cannot be granted as a result of seeking relief under the Dekkhan Agriculturists' Relief Act. [P. 202, C. 2.]

Jinnah with *H. B. Gumaste*—for Appellant.

S. B. Bakhle—for Respondent No. 8.

Macleod, C. J. :—The plaintiff sued to recover Rs. 6,000 on a bond passed by the mortgagor-defendants on the 20th December, 1892 for Rs. 15,000 whereby the suit property was mortgaged, the mortgage amount being payable by annual instalments of Rs. 500. The suit was to recover twelve instalments due under the bond commencing with 1904. As the mortgagor-defendants were agriculturists, an account was taken under the Dekkhan Agriculturists' Relief Act by the Commissioner who reported that Rs. 6,231-10-0 were due for principal and a larger amount for interest, and as the plaintiff would not be able to recover more than the amount of principal as interest, it followed that on the Commissioner's report an amount of Rs. 12,463-4-0 was due to the plaintiff.

The Judge has dealt with the Commissioner's report in a somewhat cursory fashion, as he has only considered the various bonds entered into by the defendants from time to time and has come to the conclusion that only three of those bonds for Rs. 2,000, 400 and 800 were for cash consideration. How he came to that conclusion is not very clear, because from the Commissioner's report it will be seen that the plaintiff was able to produce his accounts from 1879 showing a very large number of small cash advances at short intervals until 1892, and it would also appear that the bonds taken by the plaintiff from time to time in no way corresponded with the account which he kept of the advances made to the defendants. So that there is no reason whatever for discarding entirely the accounts as drawn up by the Commissioner, and looking only to certain bonds as having been passed for cash consideration. Considering it does not appear that the advances made by the plaintiff correspond with the amount of the various bonds passed by the defendants, we would prefer to rely on the very careful account taken by the Commissioner ; and we think that on the whole it is far more probable that on taking the accounts under the Dekkhan Agriculturists' Relief Act, over Rs. 12,000 were really due by the defendants as a result of the dealings between the parties. But under the bond itself, apart from any question of taking accounts under the Dekkhan Agriculturists' Relief Act, only Rs. 9,500 remain due, and it would be a very curious result if a debtor owing to his seeking the relief afforded by the Dekkhan Agriculturists' Relief Act should have to pay more than he is obliged to pay according to the terms of his bond.

I cannot imagine that it was ever intended that the law should produce such an extraordinary result as that. I think the proper order to pass in this suit is that Rs. 9,500 are due by the mortgagor-defendants to the plaintiff. That amount we direct to be paid in two instalments, Rs. 4,750 to be paid on the 21st June, 1922, and the second instalment of Rs. 4,750 to be paid on the 21st June, 1923. In default the plaintiff should apply under Section 15-B of the Dekkhan Agriculturists' Relief Act.

The eighth respondent, who is a party to the suit as defendant No. 9 is a second incumbrancer, and the Judge has rightly directed that the property subsequently mortgaged to him should only be sold when it has been found that the sale proceeds of the remaining properties encumbered in favour of the plaintiff are insufficient to meet the plaintiff's decree.

The costs of the appeal and of the suit to be added to the mortgage amount.

A.I.R. 1922 Bombay 202.

MACLEOD, C. J. AND SHAH, J.

Krishnagiri Trikamigiri—Plaintiff-Appellant

v.

Sheriddar Kavlekar—Defendant-Respondent

F. A. No. 190 of 1920, decided on 16th November, 1921, from the decision of 1st Class Sub-J., Belgaon, in Suit No. 135 of 1917.

Hindu Law—Math—*Heir designated by the* Guru—*Absence of formal initiative ceremonies is not material and heir will succeed.*

An heir designated by the *Guru* succeeds to the *Guruship* of a *Math* even though the formal initiative ceremonies are not performed during the life-time of the *Guru*. The designation of the heir is sufficient to enable him to succeed to the *Guruship*, the absence of the formal ceremony during the life-time of *Guru* not being really material. [P. 203, Cs. 1, 2.]

V. V. Bhadkamkar—for Appellant.

G. S. Rao and *A. G. Desai*—for Respondent No. 1.

Macleod, C. J.:—This is an appeal by the plaintiff whose suit has been dismissed on the ground that the first defendant was a designated heir of the last *guru* Ramgiri, and, therefore, was entitled to succeed. The plaintiff claimed as a *gurubandhu*. But I do not think there was any necessity to enter into the question whether as a matter of fact he was connected with the line of *gurus* to this *Math* as the first defendant was clearly designated by Ramgiri as his successor.

An application was made to the Kolhapur Darbar for permission to adopt the first defendant as a *chela*. That permission was granted. But before the initiation ceremony was carried out Ramgiri sent the first defendant to Malvan to learn business matters, so that he might be competent when he succeeded to manage the *Math* properties. When Ramgiri found his end approaching he sent for the first defendant, but unfortunately from one cause or another the first defendant arrived too late, and, therefore, although one may very safely infer that Ramgiri intended to initiate the first defendant, he was unable to do so owing to his dying before the first defendant arrived. The question then is whether in these circumstances the first defendant is not the person to succeed the *Math* rather than the plaintiff, even assuming he was able to prove that he was distantly connected as a *gurubandhu*.

I should say on general principles that the designation of the heir would be quite sufficient to enable the first defendant to succeed in the absence of the formal ceremony during the life-time of Ramgiri not being really material to his success in the suit.

I think, therefore, that the Judge was right in holding that the designated heir could succeed to the *Math* and the appeal should be dismissed with costs.

Shah, J.:—I agree. I only desire to add that there is nothing to show that the person in the position of defendant No. 1, clearly designated as heir by Ramgiri, would not be able to succeed simply because the initiation ceremony was not performed during the life-time of Ramgiri. Though the proposition has been advanced that the initiation ceremony is essential for the purpose of constituting discipleship which would entitle him to succeed to the property, no authority has been cited in support of that proposition, and I do not think that it could be said as a matter of law that where the designation has been so clear, as in the present case, the absence of formal initiation during the life-time of the last holder, Ramgiri, should present insuperable difficulty in the way of the designated disciple succeeding as heir.

Appeal dismissed.

A. I. R. 1922 Bombay 203.

MARTEN, J.

Toyo Menka Kaisha Ltd.—Plaintiffs

v.

Chabildas Nathubhai—Defendant.

O. C. J. Suit No. 2553 of 1921, decided on 30th November, 1921.

Contract Act, S. 73—Forward contract—Failure to take delivery—Right of vendor to sell at 'the then price' and claim damages depends upon consent of vendees.

The right to sell at "the then price" is based on the express or implied consent of the purchaser, and in the absence of such consent the measure of damages is the difference between the contract rate and the market rate at the due date for delivery under the original contract. [P. 204, C. 2.]

Campbell and *Davar*—for Plaintiffs.

Mehta and *Lalji*—for Defendant.

Marten, J.:—This is a vendors' suit in respect of fifty-two bales of yarn, being the balance of one hundred bales sold to the defendants on the 13th September, 1920, of which seventy-five were for ready and twenty-five for September delivery. The defendants pleaded that the plaintiffs were unable to give delivery of this balance, and that consequently the contracts were cancelled. This defence was abandoned at the trial,

and the breach of contract admitted.

The only remaining question, therefore is the measure of damages, but this gives rise to questions of some nicety which have been well argued on both sides.

Turning to the facts, in my judgment the property in the goods did not pass to the defendants. At the date of the sale the plaintiffs had two hundred bales in their godown, and though one hundred were delivered the next day to another party, I think there was no appropriation of the suit fifty-two bales to the suit contract, and no assent by the defendants to any such appropriation. The case of *Pignataro* v. *Gilroy* (1),on which the plaintiffs relied, is, I think, clearly distinguishable, for there a delivery order was sent and also a letter pointing out where the goods were. On the above finding, it follows that the plaintiffs cannot rely on the auction sale in March, 1921.

Is then the date of breach in September or October as the defendants contend, or the 28th or 18th January as the plaintiffs contend? Deliveries were taken and paid for by defendants as under:—17th September.—24 bales,: 4th October —12 bales: 21st October—12 bales: Total 48 bales leaving a balance of fifty-two. Letters calling upon the defendants to take delivery were sent by the plaintiffs on the 13th October, the 9th and 21st December, and the 12th and 25th January. The only written reply is that of the 18th January in which the defendants set up their false cancellation story. The plaintiffs account for the delay by saying that the time was extended at the express request of the defendants' broker Dharamsey.

But this they have not proved to my satisfaction. Such request is not pleaded. It is not mentioned in the correspondence. The plaintiffs' solicitors were not even told of it. Dharamsey is not called; his authority is questionable: and the plaintiffs' witnesses appeared so vague in their recollection that I cannot place any real reliance on this part of the plaintiffs' case. At most, according to them, no definite period was fixed. Only "some time."

How then am I to regard the two deliveries in October, and to which of the two contracts—if in fact there are two and not one—are the deliveries to be appropriated? I think that on the pleadings both parties regarded these October deliveres as being made under the suit contract or contracts, and not under some new contract for extension of time and so on.

It is not proved, for instance, that any interest, godown rent, or insurance premium, as from the due date was paid as set forth in the letter of 13th October. Nor were any damages paid for the difference in price at the two dates. I am unable, therefore, to infer, as Blackburn and Lush, JJ. were able to do in *Ogle* v. *Earl Vane* (2), that the understanding between the parties was that if the purchasers were ultimately unable to take delivery the vendors would be entitled to go into the market and sell "at the then price" (see p. 284). That was the converse case of a vendor unable to give delivery at due date and purchaser waiting, but I will assume in favour of the plaintiffs that there is no distinction in principle between the two.

In the present case the plaintiffs' difficulty is, I think, with reference to "the then price." That there was some forbearance by the plaintiffs, I can understand, *viz.* what Mr. Justice Blackburn describes as waiting but not binding oneself to wait (see p. 282). On the other hand it is clear from *Mutthaya Maniagaran* v. *Lekku Reddiar* (3) that this right to sell at "the then price" is based on the express or implied consent of the purchaser (see p. 415), and that, in the absence of such consent, the measure of damages is the difference between the contract rate and the market rate at the due date for delivery under the original contract. In the present case I do not think that such express or implied consent is proved.

The defendants have relied on the unreported case of *Phoenix Mills, Ltd.* v. *Madhavdas Rupchand* (4). That was a much stronger case than the present, for there the goods were to be manufactured by the Mills and nothing at all was done at the expiration of the due date. The Court there held that the plaintiffs could only succeed if the terms of the contract had clearly been altered by mutual consent,

(1) (1919) 1 K. B. 459=88 L. J. R. 726=24 Com. Cas. 174=63 D.J. 265=120 L T. 480.

(2) (1867) 2 Q. B. 275=7 B. & S. 855=15 W. R. 564=36 L. J. K. B. 175.

(3) (1912) 37 Mad. 412=22 M. L. J. 413=14 I. C. 255=1912 M. W. N. 436.

(4) (1916) 24 Bom. L. R. 142.

and as that was not shown, the original contract came to an end when nothing was done under it within the contract period. The judgment of Macleod, J. is particularly valuable in pointing out the necessity for certainty as to the terms of any new contract, and as to the difficulty of inferring from mere delivery after due date what the altered rights of the parties are to be with reference to the undelivered goods. That difficulty I have felt to the full here.

In the result, therefore, I hold that the date of breach was eight days from the 13th September as regards the ready goods and the 30th September as regards the other goods, and that the whole of the forty-eight bales of which delivery was taken must be taken to be appropriated to the ready contract, as indeed is done in the particulars, Exhibit D to the plaint.

I understand that the parties are agreed upon the September market rates. There will, therefore be a decree for the plaintiffs for damages to be calculated on the above basis. There will be interest on judgment at six per cent. and the defendants will pay the costs of the suit. The latter have put forward a deliberately false story as to the inability of the plaintiffs to give delivery of the suit bales, and their Mehta has only done his masters a disservice by going into the witness-box and repeating this false story.

I should perhaps mention that neither party relied on the words "as per usual Mill terms" in the two contracts of 13th September, nor was any evidence led to explain what those words actually mean in the present case. The case, therefore, proceeded as if those words were not in the contract, though it is possible that they may afford some clue as to why the plaintiffs demanded interest, etc., in the correspondence (see for instance the contract in the *Phoenix Mills case*.

Suit decreed.

A. I. R. 1922 Bombay 205.

MACLEOD, C. J. AND COYAJEE, J.

Balavant Ranganath—Plaintiff-Appellant

v.

Bala Malu—Defendant-Respondent.

S. A. No. 392 of 1921, decided on 11th January, 1922, from the decision of Dt. J., Ahmednagar in A. No. 95 of 1920.

Civil Procedure Code (Act V of 1908), O. XXI, Rr. 93 and 91—Execution sale—Judgment having no saleable interest in property sold—Suit by auction-purchaser for refund of purchase-money does not lie.

If it is found that the judgment-debtor had no saleable interest when the property was sold, the purchase-money cannot be recovered until and unless the sale is set aside under Rule 91 of O. 21, C.P C. An auction-purchaser can undoubtedly maintain a suit against the judgment-debtor on any ground which is open to him in law such as fraud or misrepresentation but such a suit would depend upon different evidence and would be of a different character to a suit for refund of purchase-money on the mere ground that the judgment-debtor had no saleable interest in the property sold. 39 All. 114 and 39 Mad. 803 followed. 35 Bom. 29 distinguished,

[P. 206, C.1 ; P. 207, Cs. 1, 2.]

J. G. Rele—for Appellant.

A. G. Desai—for Respondent No. 4.

Macleod, C. J.:—The plaintiff brought this suit to recover possession of the suit land from the first three defendants, or, in the alternative, to recover Rs. 417-9-0 from the fourth defendant. The fourth defendant had obtained a mortgage decree on the 15th Angust, 1913 in Suit No. 696 of 1910 against defendants Nos. 5 and 6, Sakharam and Tukaram. In the execution of that decree, the suit land was sold by auction on the 3rd March, 1917. The plaintiff purchased it for Rs. 401 and his sale was confirmed on the 23rd May, 1917. He says that he got possession of the land unobstructed, but the defendants allege that only symbolical possession was obtained and the plaintiff was never in actual possession or *Vahivat* of the land. On the 28th August, 1917, defendants Nos. 1 and 2 asserted their right to be in possession of the land, whereupon the plaintiff filed Suit No. 28 of 1917 in the Mamlatdar's Court which he lost. So he had to bring this suit.

In the trial Court it was found that defendants Nos. 1 to 3 had been in possession as owners for more than twelve years and therefore the plaintiff could not succeed as against them. The learned Judge passed a decree for Rs. 407-6-0 and costs against the fourth defendant relying on the decision in

Rustomji Ardeshir v. *Vinayak Gangadhar* (1).

In appeal this decision was reversed by the District Judge who considered that the rule laid down in *Rustomji Ardeshir* v. *Vinayak Gangadhar* (1) had no application to a sale in pursuance of a mortgage-decree under Order XXXIV, that there was no allegation of fraud, and that therefore there was no basis for the claim to recover the purchase-money.

Now under Order XXI, Rule 91, an auction-purchaser at a Court-sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold, and the period of limitation for such application is thirty days. If the order is made to set aside the sale, then the purchaser under Rule 93 is entitled to an order for re-payment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid. The corresponding section in the Code of 1882 to Order XXI, Rule 93, was Section 315 which directed :—

"When a sale of immoveable property is set aside under Section 310 (*a*) 312 or 313, or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid."

It will, therefore, be noticed that a considerable change has been made in the law by the Code of 1908, for the statutory right to file a suit for recovery of the purchase-money has been taken away. If it is found that the judgment-debtor had no saleable interest when the property was sold, the purchase-money cannot be recovered until or unless the sale is set aside. That is the construction placed on Order XXI, Rules 91 and 93 by the decision of the Allahabad High Court in *Nannu Lal* v. *Bhagwan Das* (2). The learned Judges remarked at page 119 :—

"It is only necessary to point out that there is a marked difference in the terms of the present Code of Civil Procedure and the Civil Procedure Code of 1882. Section 315 of the latter Act provided that the purchaser might get back the purchase-money when a sale had been set aside under Sections 310 (a), 312 or 313, or when it was found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser was for that reason deprived of it.

We have already pointed out that, under the provisions of the present Code, it is only when the sale has been set aside that the purchase-money can be returned : 'As regards sales under a decree of a Court, there is no warranty of title either by the decree-holder or by the Court.' In the case of *Dorab Ally Khan* v. *Abdool Azeez* (3) their Lordships remarked :—'Now it is, of course, perfectly clear that when the property has been sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the sheriff or the judgment-creditor."

The same point was dealt with in *Parvathi Ammal* v. *Govindasami Pillai* (4). In that case the Court-sale was set aside on account of irregularities in its conduct perpetrated by the decree-holder. The purchaser thereupon filed a suit for a return of the poundage fees not returned to him and interest on the purchase-money paid by him. It was held that a suit was maintainable for the recovery of the same. The argument for the appellant was that the plaintiff should have sought redress in execution and that a separate suit did not lie. Their Lordships said :—

"The present Code contains no provision regarding the right of the purchaser to obtain a refund of his purchase-money without applying to set aside the sale when it is subsequently found that the judgment-debtor had no saleable interest in the property. It may be, as suggested by Mr. Ramachandra Ayyar for the respondent that unless the purchaser seeks the aid of the Court to set aside the sale, he has

(1) (1910) 35 Bom. 29 = 7 I. C. 955=12 Bom. L. R. 723.
(2) (1916) 39 All. 114=37 I. C. 9=14 A. L. J. 1216.
(3) (1878) 3 Cal. 805=5 I. A. 116=3 Suth. 519 =3 Sar. 818 (PC.)
(4) (1915) 39 Mad. 803=2 M. L. W 861=1915 M. W. N. 797=30 I. C. 827=29 M. L. J. 467.

no remedy against the decree-holder. It was laid down by the Judicial Committee in *Darab Ally Khan* v. *Abdool Azeez* (3) that there was no warranty of title in Court-sales. See also *Sundara Gopalan* v. *Venkatavarada Ayyangar* (5). The right of action to obtain a refund consequent on the want of saleable interest in the judgment-debtor is not a right inhering in a purchaser, but is the creature of a statute, and the right thus conferred can only be exercised within the limitations prescribed. Consequently without getting the sale set aside through Court, the purchaser has no right of action."

The case relied upon by the appellant, *Rustomji Ardeshir* v. *Vinayak Gangadhar* (1), was a case under the Code of 1882 being Second Appeal No. 472 of 1909. His Lordship the Chief Justice said:—

"We think, however, that the right of the plaintiff to maintain a suit is made clear by the provisions of the Civil Procedure Code in the manner indicated in *Sundara Gopalan* v. *Venkatavarada Ayyangar* (5)." Under the Civil Procedure Code an implied warranty of some saleable interest, when the right, title and interest of a judgment-debtor are put up for sale is implied, and the purchaser's right based thereon to a return under certain conditions of the purchase-money which has been received by the judgment-creditor is recognized."

I doubt very much whether there was any necessity to base the right given by the Legislature under the old Code of 1882 to a purchaser to file a suit to recover his purchase-money on a warranty. But for the purpose of this case we are bound by the provisions of the Code of 1908, and it seems to me we should follow the cases of *Nannu Lal* v. *Bhagwan Das* (2) and *Parvathi Ammal* v. *Govindsami Pillai* (4) which decide that an auction-purchaser, at a Court-sale, should he get nothing from his purchase, must get the sale set aside under Rule 91 before he can obtain the right to ask for a refund of the purchase-money. He can undoubtedly maintain a suit against the judgment-debtor on any ground which is open to him in law, such as fraud or misrepresentation but such a claim would depend on different evidence, and would be entirely of a different character to the present suit. No fraud or misrepresentation was alleged in the plaint, and the only ground on which the plaintiff sought relief was that after he purchased the property he discovered that other persons were entitled to it.

Therefore the decision of the District Judge is right and the appeal must be dismissed with costs.

Coyajee, J.:—I agree.

Appeal dismissed.

(5) (1893) 17 Mad. 228=3 M.L.J. 293.

A. I. R. 1922 Bombay 207.

MACLEOD, C. J. AND KANGA, J.

Bachubhai Jhivad—Defendant-Petitioner

v.

Ibrahim Isak Motiwala and others—Plaintiffs-Opponents.

Civil Ex. Application No. 1 of 1922, decided on 22nd March, 1922, from an order of Dt. J., Thana, in App. No. 10 of 1921.

(a) *Civil P. C., O. 9, R.* 13—Ex-parte *decree—Application to set aside—No fresh Vakalatnama is necessary—Legal Practitioner.*

Where an *ex parte* decree is passed against the defendant in the absence of his pleader, the latter need not file a fresh Vakalatnama in order to apply to set aside the *ex parte* decree. It seems to be taking an extremely narrow view of the rules with regard to Vakalatnamas to say that the effect of the old Vakalatnama had expired as soon as the *ex parte* decree had been passed and that it would be necessary before a pleader could be heard that he should obtain a fresh one. [P. 209, C. 1.]

(b) *Bombay Pleader's Act (XIII of 1920), S. 10 (3)—Section is not exhaustive and no fresh Vakalatnama is necessary for applying to set aside* ex-parte *decree.*

Section 10 (3) is not exhaustive, and it should not compel the Court to decide that if a party or his pleader is late in attending a Court, and his case comes on for hearing in his absence, the pleader, if he appears after the case has been decided cannot be heard until he has gone back to his client and obtained a fresh Vakalatnama authorizing him to make an application to set aside the *ex-parte* decree. [P. 209, C. 1.]

(c) *Civil P. C., S. 115—Scope.*

Whenever the High Court is of opinion that the Court below has refused to hear a party on the merits without just grounds, it is entitled to interfere.

D. R. Patwardhan—for Petitioner.

B. J. Desai and *P. B. Shingne*—for Opponents.

Judgment :—This is an application in revision which involves a very important question of practice. The facts are that the plaintiff brought a suit in the Court of the First Class Subordinate Judge of Thana to eject the defendant. The defendant had instructed a pleader Mr. Patil. When the suit came on for hearing on the 7th July, 1921, Mr. Patil was absent, but he had asked another pleader Mr. Karkhanis to attend to the case for him. Mr. Kharkanis asked for an adjournment as he had no instructions, but this was refused and the hearing proceeded *ex parte.*

Although Mr. Karkhanis did not take any part in cross-examining the plaintiff's witnesses, when the Judge having heard the evidence was prepared to pass a decree against the defendant, it does appear that Mr. Karkhanis addressed the Court on the question how much time was to be granted to the defendant for giving up the premises.

Thereafter an application was made to restore the suit to the Board. The application was made by Mr. Karkhanis who did not file a fresh Vakalatnama but signed the application as "for Mr. Patil." The learned Judge treated the application as one to set aside the *ex-parte* decree; and it does not appear that he considered that the suit had been heard and disposed of under Order 17, Rule 3. But he considered that the application to set aside an *ex-parte* decree was a distinctly separate proceeding, so that even Mr. Patil could not have made the application without a fresh Vakalatnama. Accordingly Mr. Karkhanis could not make the application for Mr. Patil. The result was that the application was dismissed without being heard on the merits.

An appeal against the order was filed before the District Judge. A question arose whether an appeal lay to that Court or to the High Court on the ground that the original case in which the application was made to the First Class Subordinate Judge was a special jurisdiction case. We do not think it necessary to consider that question at present, as we are now dealing in revision with the order of the District Judge dismissing the appeal. The learned District Judge said :

"Now an application to set aside a decree is not like an application to execute the decree, but is an entirely new proceeding, outside that of the suit. This is the natural view of the case, and is supported by the authorities cited by the learned Subordinate Judge, especially page 158 of the High Court Manual of Civil Circulars, where it is expressly stated that an application to set aside an *ex-parte* decree is to be included in the proceedings which do not form part of the suit."

No doubt Chapter IV of the Manual of Civil Circulars is headed "Miscellaneous Proceedings requiring judicial inquiry" and included under para. 1 are proceedings on applications under Order 9, Rule 13 to set aside an *ex-parte* decree. It may very well be that for administrative purposes proceedings on such an application may be filed under the heading "Miscellaneous Proceedings" but they are nonetheless proceedings connected with the suit, and whether the suit is restored or not, certainly such proceedings would have to be considered with the proceedings in the suit if the matter came before a higher Court. We do not think, therefore, that the passage in the Manual of Civil Circulars really decides the question before us.

Then Section 10 of the Pleaders Act, XIII of 1920 has been referred to, and it is inferred from sub-Section (3), which states that "where a pleader has filed a Vakalatnama at the original hearing of a proceeding it shall not be necessary for him to obtain a fresh Vakalatnama for the purpose of an application for review of judgment, or of an application under Section 144 or Section 153 of the Code of Civil Procedure of 1908, or under Order 45 in the First Schedule to the said Code,

or for the purpose of an appeal under the Letters Patent," that a fresh Vakalatnama is necessary for the purpose of an application to set aside an *ex-parte* decree. Here again we do not think that Section 10 (3) is exhaustive, and that it should not compel the Court to decide that if a party or his pleader is late in attending a Court, and his case comes on for hearing in his absence, the pleader, if he appears after the case has been decided, cannot be heard until he has gone back to his client and obtained a fresh Vakalatnama authorizing him to make an application to set aside the *ex-parte* decree. After all these rules with regard to Vakalatnamas are only prescribed in order that if a party does not appear in person the Court may know that the person appearing on his behalf is competent to appear.

It seems to us to be taking an extremely narrow view of the rules with regard to Vakalatnamas to say that the effect of the old Vakalatnama had expired as soon as the *ex-parte* decree had been passed, and that it would be necessary before a pleader could be heard that he should obtain a fresh one. It seems to us, therefore, that in this case the defendant was entitled to have his application for the restoration of the suit to the Board which had been dismissed on a technical point heard on its merits.

Lastly it has been argued that the case does not come within Section 115, Civil Procedure Code. It seems to us that whenever we are of opinion that the Court below has refused to hear a party on the merits without just grounds, we are entitled to interfere. We therefore, direct that the application for the restoration of the suit to the Board should be heard on its merits by the Subordinate Judge.

We think that plaintiffs should have an opportunity of arguing before the Subordinate Judge that the opinion he has expressed in his previous judgment that the suit had been decided *ex-parte* was wrong. Costs of the application will abide the result of the application before the Subordinate Judge.

Revision allowed.

A. I. R. 1922 Bombay 209.

MACLEOD, C. J. AND KANGA, J.

Purshottam Vithaldas Shet—Plaintiff-Appellant

v.

Raoji Hari Athavle—Defendant-Respondent.

S. A. No. 600 of 1921, decided on 23rd March, 1922, from the decision of Dist. J., Thana in Appeal No. 46 of 1921.

Limitation Act, Art. 23—Suit for malicious prosecution—Time runs from date of discharge and is not suspended by proceedings to set it aside.

The suit for malicious prosecution must be brought within one year of the date of discharge of the plaintiff. The cause of action will not be suspended merely on the ground that proceedings may be taken either by Government or by the complainant in order to get the order of discharge set aside. [P. 209, C. 2.]

P. B. Shingne—for Appellant.

G. N. Thakor for *S. Moses*—for Respondent.

Macleod, C. J.:—The only question in this appeal is when did time begin to run against the plaintiff who had filed this suit for damages for malicious prosecution. The period of limitation is one year from the time when the plaintiff is acquitted, or the prosecution is otherwise terminated. In this case the plaintiff was discharged more than a year prior to the suit, and clearly his cause of ction would arise immediately on his being discharged and would not be suspended because further proceedings might be taken either by Government or by the complainant in order to get the order of discharge set aside. No doubt if a revisional application is successful and the criminal proceedings are directed to be continued, then there is no longer any cause of action, because the plaintiff is no longer a discharged person, and he has to wait until the prosecution terminates in his favour before his cause of action arises again.

It was held in *Venu* v. *Coorya Narayan* (1) that the discharge of an accused person is the termination of the prosecution. That seems obvious, because if no further proceedings are taken, the accused person is free of the charge made against him, and if the charge was maliciously made he would have a right of bringing an action against the person who instituted it.

Then in *Narayya* v. *Seshayya* (2) it was held that a suit for damages for malicious prosecution brought more than one year

(1) (1881) 6 Bom. 376.
(2) (1899) 23 Mad. 24.

from the date of the plaintiff's acquittal, but within a year from the dismissal of a revision petition which had been filed against the acquittal, was barred under Article 23. The only difference between that case and this is that the plaintiff in that case was acquitted instead of being discharged.

The result must be that the lower Courts were right in holding that the plaintiff's suit was barred. The appeal will be dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 210.

MACLEOD, C. J., AND COYAJEE, J.

Khushalsingji Himatsingji —Defendant-Applicant v.

Umansingji Daulatsingji Thakore—Plaintiff-Respondent.

Civil Extraordinary Application No. 295 of 1921, decided on 6th March, 1922, from an Order of 1st Class Sub-J., Surat, in Suit No. 245 of 1917.

Civil P. C. (1908), S. 151—Dismissal of suit for want of letters of administration but giving plaintiff liberty to apply for restitution on getting letters—Order must be taken to be one suspending suit until letters were got—Practice—Successor cannot go behind orders of predecessor.

Where, though the issues were all found for plaintiff, the suit was dismissed for want of letters of administration, but the Court gave the plaintiff liberty to apply to have the dismissal set aside on obtaining the letters, and the plaintiff on subsequently obtaining the same, applied to have the order of dismissal set aside.

Held: the order dismissing the suit was really a means of suspending the suit and at the same time discharging it from the list of suits on the file. The merits of the case having been entirely in the plaintiff's favour, he should not be prejudiced by an error in procedure on the part of the trial Court.

Held: also that the Court to which the application was made was not entitled to question the power of the Court to order allowing restitution against which no appeal was filed. [P. 211, C. 1.]

M. B. Dave—for Applicant.

H. V. Divatia—for Opponent.

Macleod, C. J.:—The plaintiff filed a suit for recovering rent due for the year *Samvat* 1973 on the strength of a registered lease passed by the defendant to several co-sharers in the village, one of whom was plaintiff, and the issues were found in favour of the plaintiff, but the Judge found that he could not get a decree unless he obtained Letters of Administration to the estate of one Daulatsingji deceased, whose adopted son he claimed to be. The proper order then to have been made was to place the suit on the stayed list to give the plaintiff an opportunity of getting Letters.

However the Subordinate Judge, no doubt, with the laudable desire of decreasing the number of suits on his file, dismissed the suit with costs, but gave liberty to the plaintiff to apply to have the dismissal set aside within a month from the date of the order, if any, passed in his favour by the District Court, Surat, for Letters of Administration to the estate of the deceased Daulatsingji.

The suit was dismissed on the 30th October, 1918. It seems to us there was considerable delay in Letters of Administration being issued to the plaintiff, for it was not until the 30th July, 1921 that on the plaintiff's application the suit was restored to the Board. The learned Judge seems to have considered that there was some doubt with regard to the order of the 30th October, 1918, as he had recourse to Section 151 of the Civil Procedure Code, before he restored the suit to the file.

The suit then came on for hearing, and as the plaintiff's claim was proved, a decree was passed for Rs. 105-13-0 and costs and further interest.

It has now been urged before us in revision that the order of the 13th October 1918, giving the plaintiff liberty to apply to have the dismissal set aside, was without jurisdiction, and therefore a nullity. But although, as we have already stated, the order was drawn in terms which afforded grounds for opposition to be raised to it thereafter, this is not a case in which the Judge has attempted to fetter the powers of a Court which might have to try another suit in the same matter between the parties. That occurred in *Sukh Lal* v. *Bhikhi* (1) where the Judge dismissed the original suit, with this reservation that his order would not prevent the plaintiff from instituting a suit for possession of the one-third interest which was included in his claim in the original suit. It was decided by the Full Bench that this order was a nullity so that there was no necessity to appeal against it, and so as in the former suit the plaintiff could have asked for a decree for the one-third share then claimed, and the whole of

(1) (1888) 11 All. 187=1889 A.W.N. 13 (F.B.).

the claim in that suit was dismissed, the decree in that suit was a decision within Section 13 of the Civil Procedure Code. It will be seen, therefore, that all that was decided by the Full Bench was that a Court in one suit cannot by giving leave to the plaintiff to file another suit bar the Court which tries that suit from deciding the question whether or not the subject-matter of the second suit was *res judicata*.

But here the question is whether the Court, where the application was made for restitution of the suit to the file, was entitled to question the power of the Court to make the order allowing restitution against which no appeal was filed. In our opinion the order of the 30th October, 1918 was really a means of suspending the suit and at the same time discharging it from the list of suits on the file of the Subordinate Judge. We should not penalise the plaintiff for an error of that description. If the defendant objected to have the chance of the suit being restored, held over his head, he should have appealed against that order.

The merits are entirely in the plaintiff's favour, and in no event do we think that he ought to be prejudiced by what at the most can be considered an error in procedure on the part of the Subordinate Judge. The rule, therefore, will be discharged with costs. ——— *Rule discharged.*

A. I. R. 1922 Bombay 211

PRATT AND FAWCETT, JJ.

Bai Reva—Defendant-Appellant

v.

Valimahomed Miyamahomed—Plff.-Respt.

L. P. A. No. 37 of 1921, from S. A. No. 102 of 1920, decided on 23rd February, 1922, from the decision of Macleod, C. J.

(a) *Transfer of Property Act (1882), S. 101 Mortgagee purchasing property—No outstanding incumbrance—Merger takes place—Onus is on purchaser to prove intention to keep mortgage alive.*

Section 101 enacts that on the acquisition of superior right, inferior right is extinguished, unless the owner declares by express words or necessary implication that it shall continue to subsist or such continuance would be for his benefit. The words "continuance would be for his benefit" are merely a guide to the intention of the owner; the question of benefit, however, must be decided in view of the circumstances existing at the time of the transaction. When there is no mesne incumbrance outstanding at the time when the mortgagee purchases the equity of redemption, the conclusion seems to be inevitable that the mortgage has been extinguished. In any case the terms of the section throw the *onus* on the owner to prove circumstances from which it can be inferred that it was to his interest to keep the charge alive, so that at the time of the transaction that was his intention. [P. 212, C. 1.]

(b) *Adverse possession—Tacking—Possession cannot be tacked unless identical in nature.*

Possession cannot be tacked unless it is identical in nature. Adverse possession as mortgagee cannot be tacked with subsequent adverse possession as vendee. [P. 212, C. 2.]

(c) *Limitation Act, Art. 134—Invalid mortgage by trustee—Later sale to him—Time runs only from date of sale.*

Limitation under Art. 134 runs only from the date of the transfer by the Trustee or mortgagee and not from the preliminary conveyance, bequest, or mortgage. [P. 212, C. 2.]

Patwardhan with *D. G. Dalve*—for Appellant.

G. N. Thakur—for Respondent.

Pratt, J.:—This is a Letters Patent Appeal from the judgment of the Chief Justice in Second Appeal No. 102 of 1920. The suit was Original Suit No. 43 of 1915, and was filed by the plaintiffs who are trustees of a *wakf*, and they sue to recover possession of three lots, which had been alienated by former trustees, in breach of trust and in excess of their authority as trustees, to the defendant or defendant's predecessor-in-title. Lots Nos. 1 and 2 were sold by these former trustees on the 9th May, 1903. Lot No. 3 had been mortgaged by them on the 9th September, 1901.

The District Judge in First Appeal dismissed the suit as regards lots Nos. 1 and 2 as time-barred under Article 134 of the Indian Limitation Act. But as to lot No. 3 the learned District Judge held that time was saved by time occupied in Suit No. 3 of 1910 which had been filed by the plaintiffs to secure a declaration that the property in suit was *wakf* property. He accordingly set aside the mortgage and decreed possession to the plaintiffs subject to their paying compensation of Rs. 99 to the defendant.

In Second Appeal No. 102 of 1920, the learned Chief Justice held that as regards lots Nos. 1 and 2 time was also saved because the period occupied in prosecuting Suit No. 3 of 1910 would be taken into account. He, therefore, held that the plaintiffs were entitled to a declaration that the sale of these two lots on the 9th May, 1903 was invalid. But as regards the prayer for possession, the defendants pleaded mortgages, one of the 5th of September, 1891, and the other in 1898, under which they were in possession at the time of the sale. As to these, the learned Chief Justice held that those mortgages were extinguished by merger, and accordingly decreed the plaintiffs' suit. As to lot No. 3, the learned Chief justice erroneously referred to the decree passed

by the District Judge as a decree for redemption on payment of the sum of Rs. 99, and he accordingly varied the decree and decreed the plaintiffs' claim for possession without payment of this sum which is really compensation but by mistake referred to as redemption money.

In this Letters Patent Appeal filed by the defendant, it is admitted that the defendant's title as regards lots Nos. 1 and 2 under the sale of the 9th May, 1903 cannot be sustained; but Mr. Patwardhan urges that the mortgages of 1891 and 1898 were not extinguished by merger. The law on the subject is enacted in Section 101 of the Transfer of Property Act under which on the acquisition of superior right the inferior right is extinguished unless the owner declares by express words or necessary implication that it shall continue to subsist or such continuance would be for his benefit.

Now, there has been here no such declaration as is contemplated by this section; but Mr. Patwardhan laid stress on the last words of the section and argues that the continuance of the mortgage would be for the benefit of his client, and, therefore, it must be held that there was no merger.

The last clause of Section 101 of the Transfer of Property Act, *i.e.*, the words "continuance would be for his benefit" are merely a guide to the intention of the owner, and it seems to me clear that the question of benefit must be decided in view of the circumstances existing at the time of the transaction. Otherwise the nature of the title might be in suspense for an indefinite time. Where there is no mesne incumbrance outstanding at the time of the sale, the conclusion seems to be inevitable that the mortgage has been extinguished.

I refer in this connection to the case of *Lomba Gomaji* v. *Vishvanath Amrit Tilvankar* (1) and the remarks of Jenkins, C. J. in the case of *Fakiraya* v. *Gadigaya* (2). In any case, the terms of the section throw the *onus* on the owner to prove circumstances from which it can be inferred that it was to his interest to keep the charge alive, so that at the time of the transaction that was his intention. No such evidence has been given on behalf of the defendants. I, therefore, think that the conclusion arrived at by the learned Chief Justice that these mortgages were extinguished on the plaintiffs' sale is correct.

It is also faintly urged that the defendant was entitled to tack his adverse possession as purchaser since 1903 to his prior adverse possession as mortgagee. But possession cannot be tacked unless it is identical in nature. Before 1903 the defendants were holding adversely only to the extent of their mortgage interest.

The appellant, therefore, has no case as regards lots Nos. 1 and 2.

As regards lot No. 3, it is true that the learned Chief Justice has treated Rs. 99 as redemption money, whereas the District Judge decreed payment of this sum not by way of enforcement of the mortgage but as compensation awardable to the defendant in return for setting aside the mortgage. However, no objection has been taken to this sum in appeal, and as it is not shown that the trust estate received any benefit from the mortgage money, it is doubtful whether this is a case in which compensation could have been awarded.

I, therefore, confirm the decree of the learned Chief Justice and dismiss this appeal with costs.

Fawcett, J.:—On the question of possession in regard to lots Nos. 1 and 2, I do not see how the fact of the defendant's having possession from 1891 under his mortgage deed can affect the question of limitation that arises in the suit. Admittedly Article 134 of Indian Limitation Act is the proper article to apply, and under that limitation runs only from the date of the transfer by the trustee or mortgagee and not from the preliminary conveyance, bequest or mortgage.

This is clear from the use of the word "transfer" in the third column, corresponding to the word "transferred" in the 1st column of the article, and is supported by a comparison of the wording of the preceding Article 133, where the word "purchase" in column 3 clearly also refers to the subsequent transaction mentioned in the 1st column. Article 142 or Article 144 does not apply to this particular case, and, therefore no question of adverse possession in my opinion, arises.

(1) (1893) 18 Bom. 86.
(2) (1901) 26 Bom. 88=3 Bom. L.R. 628.

In regard to the question of merger, I agree with my learned brother that the time, to be considered in determining whether the continuance of the incumbrance would be for the benefit of the owner of the incumbrance, must be the time of the transaction under which he becomes absolutely entitled to the property. On this point I agree with the view taken in the case of *Jugal Kishore* v. *Ram Narain* (3).

The second point is whether in this case we should draw a presumption that the defendant when he obtained the sale-deed of 1903 intended the incumbrance to subsist because it was for his benefit to do so. No doubt, in the case of *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (4) it is said: "The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest." But that was a case where a mortgagor's right, title and interest in certain immoveables was sold subject to a first and a second mortgage and the purchaser afterwards paid off the first mortgage. There was, therefore, another incumbrance subsisting, and it clearly was for the benefit of the purchaser of the mortgagor's right, title and interest that there should not be merger. Their Lordships' remark, I think, is intended to apply to cases of that description. Thus after referring to the familiar instance of a tenant for life paying off a charge after the inheritance, they say: "In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid." But that is a very different case to one where the purchaser is the original mortgagee and there is no outstanding incumbrance.

On this point I may refer to the remarks of Chief Justice Bellows in an American case cited in Ghose's Law of Mortgage in India, 4th edition, Vol. I, page 488. He says:

"The doctrine of merger springs from the fact that when the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he was seized in fee-simple."

I think, therefore, the ordinary presumption in such a case is that the owner does not intend to keep up the charge upon the estate to which he has acquired a full title. This counteracts the rule laid down in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (4), and I think the learned Chief Justice was right in holding that in this case there had been a merger.

On the other points I agree with what my learned brother has said and concur in the proposed order.

Decree confirmed.

(3) (1912) 34 All. 268=13 I. C. 619=9 A. L. J. 226.

(4) (1884) 10 Cal. 1035=11 I.A. 126=4 Sar. 543 (P. C.)

A. I. R. 1922 Bombay 213.

MACLEOD, C. J. AND SHAH, J.

Maruti Babaji Totre—Appellant

v.

Martand Narayan Kulkarani and another—Defendants-Respondents.

S. A. No. 350 of 1921, decided on 10th April, 1922, from the decision of Dis. J., Poona in A. No. 88 of 1920.

Dekkhan Agriculturists' Relief Act (1879), Section 22—Section does not apply when property descends to non-agriculturist heirs.

The immoveable property of an agriculturist is under the provisions of Section 22 immune from attachment and sale in execution of a money decree against him. The immunity, however, ceases when the property, descends on his death to his legal representatives who are not themselves agriculturists. [P. 214, Cs. 1, 2.]

A. G. Desai—for Appellants.

V. D. Limaye—for Respondents.

Macleod, C. J.:—The appellants obtained a money-decree against one Narayan Ballal in Civil Suit No. 415 of 1911 in the Second Class Subordinate Judge's Court at Khed for Rs. 635-10-0 and proportionate costs. Narayan Ballal was described as an agriculturist, and consequently as long as he was alive his immoveable property could not be attached or sold in execution of that decree. On his death the plaintiffs sought to attach the property which came to his sons as the surviving members of the joint family.

Under Section 53 of the Civil Procedure Code the sons of Narayan Ballal must be considered to be his legal representatives, and under Section 50 the decree-holder is entitled to execute his decree against the legal representatives of the deceased. But it has been urged that if the sons are not agriculturists, the property is no longer protected by

Section 22 of the Dekkhan Agriculturists' Relief Act.

In the trial Court the Judge found that the sons of Narayan Ballal were not agriculturists, but he held that the immoveable property was not attachable in the hands of the heirs of Narayan even if it were proved in execution of a money-decree that they were not agriculturists.

In appeal unfortunately the District Judge thought it was not necessary to record a finding on the question whether the sons were agriculturists, as in the first place, he could not do so without further inquiry which would necessitate a remand, and because in the second place, on the other issue he agreed with the Subordinate Judge. The point is not covered by any authority to which we have been referred, therefore the matter is one of first impression. Section 22 says :—

" Immoveable property belonging to an agriculturist shall not be attached or sold in execution of any decree or order passed whether before or after this Act comes into force, unless it has been specifically mortgaged for the re-payment of the debt to which such decree or order relates, and the security still subsists. For the purpose of any such attachment or sale as aforesaid standing crops shall be deemed to be moveable property."

The result of that section is that when immoveable property is sought to be attached in execution of a money-decree, and it is found that at the time of attachment such property belongs to an agriculturist, then it shall be free from the attachment. But it does not follow that such protection continues when the agriculturist to whom the property belongs dies and the property goes into the hands of his heir or legal representative who is not an agriculturist.

It seems to me that the section clearly denotes that the only question to be decided when immoveable property is sought to be attached for a money-decree, is whether at that time it belongs to an agriculturist or not, and we cannot read into the section any further words so as to make the section read that the property should still be protected from attachment if it once belonged to an agriculturist judgment-debtor, although it has passed by inheritance or otherwise into the hands of a person who is not an agriculturist. The object of the section was to protect in the hands of an agriculturist immoveable property belonging to him from which he derived the greater part of his income and the necessity for such protection is at once removed when such property passes into the hands of a person who is not an agriculturist.

It seems to me, therefore, that if the sons of Narayan Ballal cannot satisfy the Court that they are agriculturists, the property is liable to be attached. But as there has been no finding on this question by the District Judge, the case must go back to the District Court to record a finding on that issue, and if necessary to remand the case to the trial Court for further evidence.

Shah, J.:—The learned District Judge in this case has acted upon the view that " in construing and applying Section 22 of the Dekkhan Agriculturists' Relief Act for the present purpose, one must regard the respondents merely as representatives of Narayan's estate, and must determine the liability of the property with reference to the liability to which it was subject in the hands of Narayan."

That is a view with which I am in sympathy, and it may be that the framers of the Act really wanted to go so far. But we have to construe the words used by the Legislature, and to determine the intention of the Legislature from the plain meaning of the words. It is clear that Section 22 really provides that immoveable property belonging to an agriculturist shall not be attached or sold in execution of any decree or order passed whether before or after this Act comes into force. In the absence of any indication to the contrary that would mean that at the date of the attachment or sale the property must belong to an agriculturist. When the original defendant, who was undoubtedly an agriculturist, died the property ceased to belong to him; and though for execution purposes it is treated as the estate of the deceased in the hands of his legal representative it must be taken to belong at the date of the attachment to the legal representative.

Unless the legal representative is shown to be an agriculturist, the provisions of Section 22 cannot be held to afford an answer to the application for execu-

tion against him. It is rather strange that there should be no reported decision on this point, though the Act has been in force for many years. *Case remanded.*

A. I. R. 1922 Bombay 215.

MACLEOD, C. J. AND COYAJEE, J.

Shankarbhat Balambhat Kanitkar—Plaintiff-Appellant

v.

Sakharambhat. Harbhat Kanitkar and another—Defendants-Respondents.

Appeal No. 197 of 1921, decided on 6th March, 1922, from the order of Sub-J. Poona.

Civil P. C., O. 33, R. 9—Concealment of property insufficient to pay Court-fee, not a ground for dispaupering plaintiff.

The plaintiff held a policy the surrender value of which would not be enough to cover the amount of Court-fee, but did not disclose this fact, and was allowed to sue as pauper. The Court having notice of this dispaupered him.

Held: the concealment, assuming his conduct to be improper, would not entitle the Court to dispauper him. [P. 215, C. 2.]

S. Y. Abhyankar—for Appellant.

K. V. Joshi—for Respondents.

Judgment:—The plaintiff applied to the First Class Subordinate Judge to file a suit *in forma pauperis*. Notice was issued to the Government Pleader who did not appear, and to the opponents who asked for time. The Judge saw no reason to grant further time, and decided in favour of the applicant *ex parte*, the Judge being satisfied that he was a pauper and unable to pay the requisite Court-fee stamp on the plaint. That order was made on the 6th November, 1920.

On the 8th April 1921, an application was made the exact nature of which is not quite clear from the record. But it was refused by the Judge on the ground that the plaintiff had been guilty of fraud from the beginning. The same day the Judge held the plaintiff to be dispaupered and the suit was dismissed. The *Roznama* is not very clear as printed at P. 1, because it will be seen that the defendant applied that the plaintiff be dispaupered since he held a life Policy. Accordingly he was dispaupered and ordered to pay Court-fee by a fixed date. He did not pay on the date fixed and took further time. On the 8th April he said he could not pay the Court-fees because his Policy was valued at only Rs. 245. The Judge held that his conduct had been improper and so he should be dispaupered, and as he was not going to pay Court-fees, his suit was dismissed.

Now it is quite true that the plaintiff did not mention the fact when he applied for leave to file a suit *in forma pauperis* that he held a life Policy. That was an endowment Policy for Rs. 1,000, which would only be paid at the end of the endowment period, provided the *premia* were duly paid, and it is quite possible that the plaintiff never considered the Policy as a present asset, or that it had a surrender value, so that we hardly think that the Court would be justified in saying that he had been guilty of gross fraud on the Court by concealing the Policy.

The only result would be, when the fact that the plaintiff had that Policy came to the notice of the Court, that it would consider whether by surrendering the Policy the plaintiff could raise sufficient money to pay the Court-fee. It is admitted that even if he surrendered his Policy he could not pay the Court-fee which would amount to over Rs. 500.

The result is that on the merits the Judge took too severe a view of the plaintiff's conduct. Order 33, R. 9 directs that the Court may order the plaintiff to be dispaupered if he is guilty of vexatious or improper conduct in the course of the suit or if it appears that his means are such that he ought not to continue to sue as a pauper. Even assuming that concealment of property might in a particular case amount to improper conduct, which by itself would entitle the Court to dispauper a plaintiff, the fact which came to light in this case only demanded a further scrutiny by the Court to ascertain whether the plaintiff had means, so that he ought not to be allowed to continue the suit as a pauper. If that scrutiny had been made, it would have been discovered that the plaintiff was still unable to pay the Court-fees.

The respondent, however, objects that it is not competent to this Court to deal with the order of the First Class Subordinate Judge dismissing the suit. It would be open, we presume, to the plaintiff to file another suit to-morrow and apply to the Court for leave to prosecute that suit *in forma pauperis* and the previous proceedings would not bar such an application, nor would the Court be entitled to take into consideration the plaintiff's conduct in those proceedings.

It would seem, therefore, to disallow the appeal on the ground set forward by

the respondent, would not in any way assist him, and even assuming that the point is a good one, we could deal with the matter either in revision or under Section 151 of the Civil Procedure Code.

We think this is clearly a case in which the plaintiff should not be debarred from continuing the suit. We set aside the order dismissing the suit and direct that the plaintiff be allowed to continue the suit *in forma pauperis*. All costs will be costs in the case.

Order set aside.

A. I. R. 1922 Bombay 216.

COYAJEE, J.

Mari Doddatamma Markundi—Defendant-Appellant

v.

Santaya Ramkrishna Pai Kolle—Plaintiff-Respondent.

S. A. No. 640 of 1921, decided on 7th March, 1922, from the decision of Dist. J., Kanara in Appeal No. 151 of 1920.

Specific Relief Act, Ss. 9 and 56—Decree under S. 9 against A, in possession—A can sue to establish title and for injunction restraining decree-holder from executing decree.

A person in possession against whom a decree under Section 9 of the Specific Relief Act has been passed in favour of another person, can bring a suit to establish his title to the land and for an injunction restraining the other person from executing his decree. Section 56 of the Act is no bar thereto. [P. 216, C. 2.]

Y. N. Nadkarni—for Appellant.

G. P. Murdeshwar—for Respondent.

Judgment :—The respondent being in possession of certain lands instituted the suit which has given rise to this appeal, to seek an injunction to restrain the appellant from dispossessing him by enforcing the decree passed in Suit No. 293 of 1917. He further asked to be restored to possession if during the pendency of this suit he is so dispossessed. The facts which have necessitated these proceedings are as follows :—

In or about March, 1915 the respondent put the appellant in possession of the suit lands under a *chalgeni* agreement. In 1917 the respondent obtained a decree in the Court of the Mamlatdar at Kumta in possessory Suit No. 3 of 1917 and took possession which he has retained ever since. The appellant then brought Suit No. 293 of 1917 in the Court of the Subordinate Judge of Kumta for restoration of possession, under Section 9 of the Specific Relief Act, 1877. He obtained a decree in his favour, but before he could execute it the respondent instituted the present suit to establish his title to the lands and to obtain an injunction as stated above.

The lower Courts agree in holding that the respondent has established his title to the said lands. The decree passed by the trial Court, which has been affirmed by the District Court, is in these terms :—

" Plaintiff is entitled to continue to be in possession of the suit land. Defendant is permanently restrained from obstructing the plaintiff's possession of the land on the strength of the decree in Civil Suit No. 293 of 1917. The decree is inoperative and incapable of execution to that extent by virtue of this order."

It has been urged in this second appeal that this decree offends against the provisions of Section 56, Clause (b) of the Specific Relief Act. Now the decree passed in Suit No. 293 of 1917 was clearly one contemplated by Section 9 of that Act. The object of that section is to discourage people from taking the law into their own hands, however good their title may be. *Krishnarav* v. *Vasudev* (1). It provides "a summary and speedy remedy through the medium of the Civil Court for the restoration of possession to a party dispossessed by another, leaving them to fight out the question of their respective titles if they are so advised " *Wali Ahmad Khan* v. *Ajudhia Kandu* (2).

An order or decree passed under that section is not open to appeal or to review at the instance of the defeated party ; and the section expressly provides that nothing contained therein shall bar any person from suing to establish his title to such property, and to recover possession thereof.

It was therefore competent to the respondent to institute this suit to establish his title to the lands in dispute ; and being in possession thereof, the only further relief which he could seek was an injunction to restrain the appellant from disturbing his possession. The terms of the decree passed by the lower Court are, in my opinion, unobjectionable.

In support of the appellant's contention, reliance was placed on the following observations in the judgment of

(1) (1884) 8 Bom. 371.
(2) (1891) 13 All. 537=1891 A.W.N. 196.

Markby, J. in *Dhuronidhur Sen* v. *Agra Bank* (3).

"But for one Judge to issue an injunction against a decree-holder to restrain him from executing the decree of another Judge exercising co-ordinate jurisdiction, upon the ground that the proceedings by which the decree was obtained were altogether illegal, is, as far as I am aware, a proceeding entirely without precedent, and one which seems to me very dangerous to introduce. It has already been found difficult enough to bring litigation in this country to a termination, and if we were to grant this injunction, I am very much afraid that advantage would be taken of the precedent to prolong litigation very much further."

The decree there under consideration was not one passed under the said Section 9. It is therefore not easy to see how the above pronouncement could apply to the facts of this case where the respondent is in effect seeking that remedy which is expressly allowed to him by that enactment. This case rather comes within the following observation in the same judgment (p. 395).

"In some cases a suit to reverse the order, treating it as a summary order, may be brought."

The sole object and purpose of the present suit is to obtain a reversal of the order made in Suit No. 293 of 1917, treating it as of a summary nature.

For these reason I affirm the decree of the lower Court and dismiss this appeal with costs. *Appeal dismissed.*

(3) (1878) 4 Cal. 380=3 C. L. R. 421.

A. I. R. 1922 Bombay 217.

MACLEOD, C. J. AND KANGA, J.

Raghunath Sadashiv Thakur—Plaintiff-Appellant v.

Dadaji Shamrao Thakur and another—Defendants-Respondents.

App. No. 259 of 1921, decided on 23rd March, 1922, from Ratnagiri in A.No. 148 of 1920.

T. P. Act, Ss. 68 and 66—Property included in mortgage not belonging to mortgagor—Suit by mortgagee for fresh security is not maintainable—Action in deceit is proper remedy.

Where in a mortgage-deed certain property was misdescribed as belonging to the mortgagor, and the mortgagee on discovering it sued the mortgagor under Section 68 for fresh security or for a personal decree.

Held: that the suit does not lie and that the only remedy the mortgagee would have against the mortgagor, for having inserted in the details of the mortgaged property, property which did not belong to him, would be an action in deceit. Misdescription of property forming security is not rendering property insufficient as defined in Section 66 which deals with waste by the mortgagor in possession and accordingly has nothing whatever to do with regard to the land which the plaintiff thought he had got in mortgage.

[P. 218, C. 2.]

A. G. Desai—for Appellant.

S. S. Patkar—for Respondent.

Judgment:—This is a suit of a most peculiar nature. The plaintiff was the mortgagee under a registered mortgage for Rs. 400, dated 19th May, 1901, whereby certain lands at Mhapan were mortgaged. The plaintiff filed Suit No. 91 of 1915, and obtained a mortgage-decree, which was made absolute and transferred to the Collector for execution. When the Collector took up properties Nos. 3 and 6 for sale, it was found on inquiry that the area and assessment of property No. 3 was less, and that No. 6 did not belong to the defendants.

The plaintiff thereupon made inquiry regarding the rest of the property mortgaged, and discovered that out of the property mortgaged only Thikan No. 5 belonged to the defendants. Even that Thikan has not been included altogether. The plaintiff accordingly found himself in a very unfortunate position.

If the facts set out above are correct, the plaintiff had a claim to recover damages in an action for deceit against the mortgagor for mortgaging properties which did not belong to him. Instead of filing such an action, the plaintiff filed the present suit asking for the amendment of the decree in Suit No. 91 of 1915, and that the defendants should be ordered to substitute other property than that mentioned in the plaint, and that the suit property should be ordered to be sold, and that any balance due should be made recoverable personally from the defendants.

Further the plaintiff also asked that if the Court should be of opinion that no suit was necessary, then the Court should treat this as an application under various sections and rules of the Code, or under any other law that might be applicable. The Judge of the trial Court was right in saying that the plaint was framed in such equivocal language and contained so many unnecessary repetitions, that it

had been a puzzle to that Court to find out what relief the plaintiff exactly sought.

On the evidence on issue No. 5—"Does the plaintiff show that defendants fraudulently misdescribed the property at the time of the mortgage" the Judge said:

"As to the 5th issue, the plaintiff clearly states he has no evidence to show that the defendants practised fraud on him. He said that he had inspected the properties and was satisfied that they were good security, he did not call for title-deeds because the defendants were his Bhaubands. From this it is clear that the defendants did not deceive the plaintiff but that the latter was guilty of gross negligence in not looking after his interests. His plea that he is ignorant is not tenable, for, he is an educated man and knows that proper inquiries have to be made when transactions of this nature have to be entered into. He has himself purchased other lands and made inquiries into title; his failure to do so in this case does not entitle him to charge the defendants with fraud. But his allegation entirely falls through when he clearly admits that before the execution of the mortgage he was aware that the lands mortgaged did not belong to them. In the circumstances, I hold that the plaintiff has totally failed to prove fraud by the defendants."

But we doubt very much really whether on the pleadings any issue of fraud was relevant.

In appeal the plaintiff met with no further success, and it seems to us that a more hopelessly misconceived suit could not possibly have been imagined. We have been urged to apply Section 68 of the Transfer of Property Act. But that section has nothing whatever to do with the case. It deals with the right of the mortgagee to sue for the mortgage-money, and especially in the case where, by any cause other than the wrongful act or default of the mortgagor or, mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in Section 66, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.

It is suggested that owing to misdescription in the mortgage-deed the security has been rendered insufficient. That may be correct, but it is not insufficient as defined in Section 66 which deals with waste by the mortgagor in possession, and accordingly has nothing whatever to do which the present situation with regard to the land which the plaintiff thought he had got in mortgage.

If there has been any misdescription of the property actually mortgaged in the mortgagee-deed, which again had been embodied in the mortgage-decree, then, no doubt, on an application to the Court which passed the decree, the mortgagee may be able to satisfy the Court that there really was a clerical error in the mortgage, and therefore, as the mortgage was merged in the decree, he may get the Court to amend the decree.

But as we understand the case, it is not a case of misdescription but a case of inclusion, in the mortgaged property, of property not belonging to the mortgagor. As we have endeavoured to point out, it would follow that as far as that property was concerned, it was not security for the mortgage debt as it belonged to a third party, and therefore, must be considered as non-existent for the purpose of mortgage, and the only remedy the mortgagee would have against the mortgagor, for having inserted in the details of the mortgaged property, property which did not belong to him, would be an action in deceit.

The appeal fails and must be dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 218.

MACLEOD, C. J. AND COYAJEE, J.

Ghanashyamdas Vishnudas Gandhi—Plaintiff-Appellant

v.

Laxmibai and others—Defendants-Respondents.

S. A. No. 78 of 1921, decided on 1st March 1922, from the decision of Dist. J., Satara in Appeal No. 356 of 1919.

Hindu—Law—Adoption by minor widow of her guardian's son—Onus of proving validity is on adoptee who sets it up.

Where the adoption is made by a minor Hindu girl under guardianship, of a boy who is the son of one of the guardians, the *onus* of proving the validity of the adoption is on the adoptee who alleges his adoption. In the case of a Hindu widow of immature age, the Court is bound to consider all the circumstances surrounding the adoption set up which she disputes as not having been made by her of her own free will.

[P. 219, C. 1; P. 220, C. 2.]

T. Strangman and *J. Desai* with *A. G. Desai*—for Appellant.

Jinnah and *K. N. Koyaji*, *S. R. Paulkekar*—for Respondents.

Judgment:—The plaintiff sued for a declaration that he was the lawfully adopted son of the deceased Vishnudas, who died in 1911, leaving the 1st defendant, the widow, him surviving. On an application to the District Court under Act VIII of of 1890, defendants 2 to 5 were appointed guardians of the person and property of defendant 1, and in that capacity defendants 2 to 5 took the property in their possession and began to manage it. The plaintiff claimed that he was adopted on the 2nd May 1914 when the 1st defendant, the widow, was 16 years and 8 months old. There is no doubt that the adoption ceremony took place. But we should have thought that the very fact the adopted son was the son of a certificated guardian would be quite sufficient to throw suspicion on the whole transaction, and would throw the *onus* on the plaintiff to show that it was a valid adoption brought about with the free consent of the 1st defendant.

In the trial Court various issues were raised. The principal issue was:—Is it proved that the alleged adoption was brought about by fraud, coercion and undue influence exercised on defendant 1. After a very careful and lengthy consideration of the evidence on that point, the learned Subordinate Judge came to the conclusion that the proper finding on that issue was in the affirmative. Consequently the plaintiff's claim was rejected.

Then in appeal the question arose whether the suit as framed was tenable. Eventually the Assistant Judge directed a remand of the suit to the lower Court for taking necessary action in the light of his judgment and returning the record and proceedings together with its fresh findings on issues Nos. 12 and 15, if necessary, within two months. Now issues 12 and 15 were as follows:—(12) Is the plaint properly stamped? and (15) Is the claim properly valued for purposes of jurisdiction? The remand was made to enable the plaintiff to elect whether he should amend the plaint and pay the additional Court-fees.

When the case was returned to the Subordinate Judge, the plaintiff was not prepared either to add a prayer for possession, or to pay the Court-fees on the value of the property. The Subordinate Judge, therefore, returned the record of the suit as it stood to the Appellate Court.

Then two preliminary objections were raised against the competence of the appeal. It was pointed out that the trial Judge held that the proper claim of the plaintiff was worth Rs. 56,000 and hence his finding on the question of adoption was recorded in his capacity as a First Class Subordinate Judge so that an appeal lay to the High Court, and not to the District Court. The Assistant Judge did not agree with that view. He thought the lower Court had found that the claim should have been for possession, and in that case its value would be Rs. 55,000.

But the plaintiff did not choose to make that claim, and if the plaint was not amended, the value of the claim was not enhanced by the mere finding that it required to be amended. So that as the suit as framed was not one of special jurisdiction, and as the plaintiff refused to amend his plaint, the appeal lay to the District Court. He therefore ordered the appeal to be set down for hearing on merits; and eventually it came on before the District Judge.

Unfortunately the points argued in appeal are not set out. But in appeal, as in the lower Court, the important issue must have been the original issue No. 9 which was purely a question of fact, and the District Judge in dealing with the remarks of the Judge in the Court below came to the conclusion that the findings were correct; and it appears to us that there is no question with regard to on whom the *onus* lay, as all the evidence and everything that the defendant could urge on the question of undue influence was supported by the evidence she alleged and it was on that evidence that the Subordinate Judge found that the adoption was not made

with the consent of the 1st defendant.

But we also think the Judge was right in referring to the case of *Bayabai* v. *Bala* (1) and we are not justified in disregarding what was said by the learned Judges in that case. At p. 20 their Lordships say: "Not only was the appellant a Hindu female whom the law only barely recognises a, *sui juris*—so careful, does it require that the Court should be in ascertaining that she has full knowledge of the nature and consequences of any acts affecting her legal rights, which she has been induced to perform—but she was only 17 years of age at the time of the alleged adoption (as was admitted in the course of the arguments), and she could have had little more experience or knowledge of the world than a mere child. If she adopted, or assented to the adoption of, the infant plaintiff at all, she manifestly did so at the suggestion of Brahmans, Gumastas, and clerks who surrounded her, and who were the real actors on the occasion, and who were desirous to transfer to their own hands the control and management of Ramakant's property and firm during the minority of the infant plaintiff.

Looking at the effect of adoption upon the rights of a Hindu woman who succeeds to the property of her husband, we should expect clear evidence that she was fully informed of those rights, and of the effect of the act of adoption upon them:—an act which reduces her from the position of complete and absolute mistress of her husband's moveable property, and tenant, for life at least, of his immoveable property, to a mere right of maintenance. Hindu women should be shielded from cajolery and undue influence with nearly all the jealous strictness with which the rights of a minor or other persons, not *sui juris* are watched—not an iota of which strictness should be abated in the instance of a widow just emerging from infancy, as was the case with the appellant at the time of the alleged adoption.

Some relaxation of this strictness would of course, be allowable in the case of a Hindu woman whose husband has directed that she should adopt. She is then under at least a moral duty to adopt, and the act of adoption by her is one which may justly be expected. It is different in the case of a woman whose husband leaves no such direction, because the act is one in derogation of her own right, and not in obedience to any order of her husband, and especially so in the case, in which the husband, from an anxiety to preserve his estate in tact for his wife, has positively refused to adopt. If the conscience of the Court were satisfied that the widow voluntarily performed the ceremonies absolutely essential for adoption, and had been previously fully informed, first, of her rights, and secondly, that the effect of an adoption upon them would be wholly to divest her of those rights and to reduce her to a maintenance, it would be the duty of the Court to uphold that act of adoption, supposing the law to be that a widow may, at this side of India, adopt a son without the express authority of her husband—a question on which we do not consider it necessary, nor do we propose now, to express any final opinion."

Therefore that case is clear authority for the proposition that in the case of a Hindu widow of immature age, the Court is bound to consider all the circumstances surrounding the adoption set up, which she disputes as not having been made by her of her own free will; and it is difficult to imagine a stronger case than this, in which the adopted son is the son of a certificated guardian.

We should have thought ourselves that the *onus* would certainly lie on the plaintiff to satisfy the Court that all the precautions had been taken which were necessary to satisfy the Court that the adoption was made with the free consent of this girl.

The appeal must be dismissed with costs. Separate sets of costs.

Nothing that we have said above is meant to diverge from the view we stated at the commencement of the judgment that it is a pure question of fact from which no second appeal is competent.

(1) (1870) 7 B. H.C.R. App. 1.

A. I. R. 1922 Bombay 220.

MACLEOD, C. J. AND COYAJEE, J.

Devu Jetiram Gujar—Defendant-Appellant v.

Revappa Satappa Shintre—Plaintiff-Respondent.

S. A. No. 581 of 1921, decided on 20th January, 1922, from the decision of District Judge, Belgaum in A. No. 87 of 1918.

Dekkan Agriculturists' Relief Act (1879), S. 15-B.—Person becoming agriculturist after decree—S. 15-B does not apply.

Under the provisions of Section 15-B. instal

ments cannot be granted under a decree to a person who at the time the decree was passed was not; but has since become, an agriculturist.

[P. 221, Cs. 1, 2.]

S. S. Patkar—for Appellant.

Nilkanth Atmaram—for Respondent.

Macleod, C. J.:—The plaintiffs applied for execution of their decree in Suit No. 240 of 1909 by sale of part of the mortgaged property. It was admitted that the defendant at the time the decree was passed was not an agriculturist, but on the allegation that he had since become an agriculturist, he claimed to be entitled to the benefit of Section 15-B of the Dekkhan Agriculturists' Relief Act. Both the lower Courts have held that assuming that the defendant had become an agriculturist since the decree was passed, he was not entitled to the benefit of Section 15-B.

In *Balchand Chaturchand* v. *Chunilal Jagjivandas* (1) the question arose whether a defendant who was not an agriculturist at the time when a money decree was passed against him, but who had become one later, could at the time of execution ask the Court under Section 20 of the Dekkhan Agriculturists' Relief Act to grant instalments. Mr. Justice Heaton said :—

'In this case the First Class Subordinate Judge of Nasik has applied Section 20 of the Dekkhan Agriculturists' Relief Act to the case of a judgment-debtor who was not an agriculturist when the decree was obtained, but who by discarding trade and limiting himself more exclusively to profits in land had become an agriculturist at the time of the execution. We do not think that he was empowered to do this. It seems to us to be quite clear that Section 20 cannot apply to the case of a person who was not an agriculturist when the decree was obtained, whatever his status may be thereafter when execution comes to be taken out against him."

It has been argued that Section 20 of the Dekkhan Agriculturists' Relief Act expressly refers to a decree passed against an agriculturist, whether before or after the Act came into force, while Section 15-B only refers to decrees for redemption, foreclosure or sale in suits of the descriptions mentioned in Section 3, Clause (*y*) or Clause (*z*), and consequently the fact that a defendant or any of the defendants, who was not an agriculturist at the time the decree was passed, but became one thereafter, does not prevent his being a party to a suit of that description.

But we think that considering the nature of the Act, the description of "suit" in Section 3 is not confined to the relief claimed in the suit, but also includes the status of the parties. Otherwise the result would be that in all suits for redemption, foreclosure or sale, if subsequently the defendant brought himself within the definition of an agriculturist, he would be entitled to the benefit of Section 15 B, and we do not think that was the intention of the Legislature, or that is what the law enacts.

We think, therefore that the decision of the Court below was correct and the appeal ought to be dismissed with costs.

Appeal dismissed.

(1) (1913) 37 Bom. 486=19 I. C. 901=15 Bom. L. R. 387.

A. I. R. 1922 Bombay 221.

MACLEOD, C.J. AND SHAH, J.

Ardeshwar Jivanji Mistri—Accused-Applicant v.

Emperor—Opposite-Party.

Cr. Rev. No. 261 of 1921, decided on 10th November, 1921, from an order of the Magistrate, Bandra.

Bombay District Municipal Act (1901), S. 188 sub-Section 1—Rules under Rr 27 (1), (2), (3), (4) & (5)—Permission cannot be refused for indefinite period—Notice given under R-27 (1)—Conviction under R-27 (5) is wrong.

An order refusing permission for an indefinite period cannot be passed. There is no justification for the conviction under R. 27 (5) if the petitioner has given notice as required by sub-rule (1) and the Municipal Committee have neither passed orders under sub-rule (2) nor issued any provisional order or demand for further particulars under sub-rule (3). [P. 222, Cs. 1, 2.]

Coyajee and *P. B. Shingne*—for Applicant.

S. S. Patkar—for Respondent.

Macleod, C. J.:—The accused in this case were convicted under Rule 27(5) passed by the Government under the powers conferred by Section 188, sub-Section (1), of the Bombay District Municipal Act. The facts are correctly stated in the petition which the accused has made to this

Court in revision. I need not set them out again. The accused had asked for permission in the proper form to build on his own land. He got what is called a model reply on the 5th November, 1920 "permission refused," and it is necessary to point out that although that model reply purports to have been sent according to the provisions of Rule 27 (3), all that the Committee could do was to pass a provisional order directing that for a period, which shall not be longer than one month from the date of such order, the intended work shall not be proceeded with. On the face of it this order refusing permission was for an indefinite period.

Under sub-Rule (4), a person who has given notice under sub-Rule (1) may proceed with his building, if the Committee within one month from the receipt of the notice given under sub-Rule (1) have neither passed orders under sub-Rule (2), nor issued under sub-Rule (3) any provisional order or any demand for further particulars.

The Committee had not issued proper orders under either sub-Rule (2) or sub-Rule (3), and consequently the petitioner was entitled to build. After the petitioner received the order of the 5th November, he called on the Chairman of the Committee and requested him to give the grounds for refusing permission. Thereafter the petitioner was informed by a letter dated the 20th November, 1920 that permission to build was refused because there was no existing metalled road there and none projected, and also that a bungalow there would lead to undesirable congestion.

We have been shown a plan of the petitioner's land, and it shows that on three sides, there is a Gawan or cattle track about ten to twelve feet wide. On the other side of the cattle track to the south is the property of Mr. Guzdar, and the petitioner alleges that permission for him to build was refused because Mr. Guzdar was desirous of buying up petitioner's land. However that may be, it appears to us that neither of the reasons given in the letter of the 20th November, was justified by the circumstances of the case or by the rules.

A reference was made afterwards to bye-law 38 which provides as follows: "notwithstanding anything contained in Rule 27 (4) no person shall commence to erect any building which would not front on a public street unless he, having duly obtained the approval of the Committee under Rule 22 B, has constructed a street in accordance with the orders of the Committee providing access to the building from a public street."

Nothing is said in the bye-law about metalled roads, and if the provisions of that bye-law had been followed the Committee might have called upon the petitioner to provide access to his building from the public street. We think, therefore, that there was no justification for the conviction under Rule 27 (5) as the petitioner had given notice as required by sub-Rule (1). He had furnished the documents and afforded the information which was required of him, and no legal order had been served on him which would prevent him from building.

We think therefore, that the conviction was wrong and should be set aside, and the fine, if paid, refunded.

Shah, J.:—I agree.

Conviction and sentence set aside.

A. I. R. 1922 Bombay 222.

MACLEOD, C. J. AND SHAH, J.

Nowroji Hormasji Pathak—Plaintiff-Petitioner

v.

Srinivas Prabhu—Opponent.

Civ. Extr. App. No. 305 of 1920, decided on 13th October, 1921, from the decision of Chief J., the Court of Small Causes, Bombay in Suits Nos. 4338 and 4339 of 1920.

Bombay Rent (War Restrictions) Act, (1918), S. 9—Ejectment—Landlord requiring rented premises reasonably and bona fide*—Landlord and not the Court, is to decide how much space he requires.*

To prevent the Landlord from occupying a space in his own premises equal to the space previously rented by him for his own business in another place would be going entirely beyond the jurisdiction of the Court in cases falling under the Rent Act. It is for the landlord and not for the Court to decide whether he should occupy as much or less space for his business in his own premises. [P. 223, Cs. 1, 2.]

D. R. Patwardhan—for Petitioner.

Macleod, C. J.:—The plaintiff filed this suit in the Small Causes Court to eject his tenants (the defendants) from certain shops in Lamington Road belonging to

him which he wished to use for his own purposes. The plaintiff had previously rented certain premises in Hornby Road the floor space of which was 2,000 square feet. He had to vacate these premises and consequently he wanted to occupy his own premises in order to store his goods and expose them for sale. It is not suggested that he is asking the Court to eject the defendants from a greater space than the space he occupied in the premises he rented in the Hornby Road.

But the learned Judge considered that it was for him to decide how the plaintiff's business should be carried on and what amount of space in the plaintiff's premises would be adequate for that purpose. He thought that it would not be profitable to the plaintiff if he occupied the whole of the premises, and so he ordered that the plaintiff should only get possession of a part, as it might take time to accustom the population of that locality to purchase the kind of goods which the plaintiff was selling. As a result he held that the space which was occupied by the defendants in this suit was not reasonably required for the plaintiff's use.

Now we do not say that there may be cases in which if a plaintiff doing business in rented premises on a small scale wanted to occupy premises of his own which were far larger than those rented by him, the Court would not have power to decide that the plaintiff was asking for more space than was reasonably required. But in this case the plaintiff is not asking for more space than he had previously been in occupation of for the purpose of his business. It is true he had to move from one part of the city to another.

But in our opinion the plaintiff was the person to decide whether he should occupy as much or less space for his business in his own premises. There was nothing unreasonable in his thinking that the goods which he had stored in the premises in Hornby Road could with equal advantage be stored in the premises in Lamington Road. If he had been asking the Court to give him an ejectment order against tenants occupying a far greater space than he had occupied in the rented premises, then no doubt it might have been a different matter.

It seems to us that to prevent the plaintiff from occupying a space in his own premises equal to the space previously rented by him on the ground stated by the learned Judge would be going entirely beyond the jurisdiction of the Court in cases falling under the Rent Act. We make the rule absolute.

There will be a decree for possession within one month of the service of this order on the occupants of the shop with costs throughout. *Rule made absolute.*

A. I. R. 1922 Bombay 223.

FULL BENCH.

MACLEOD, C. J., SHAH AND FAWCETT, JJ.

Doddawa and another—Defendants-Appellants

v.

Yellawa Mallappa Beni—Respondent.

L. P. A. No. 91 of 1920, decided on 16th November, 1921, from the decision of Macleod, C. J., in S. A. No. 445 of 1920.

Limitation Act, Art. 118—Suit for possession, where plaintiff cannot succeed without displacing an adoption—Art. 118 does not apply.

Per *Macleod, C. J. and Fawcett, J*: (*Shah, J. contra*).—In view of the decision of the Privy Council in (1906) 28 All. 727, 33 I. A. 156 (P.C.) the decision in *Shrinivasa* v. *Hanmant* is not good law, and suits for possession where the plaintiff cannot succeed except by displacing an alleged adoption are not governed by Article 118 of the Limitation Act.

[P. 231, C. 1; P. 232, C. 2.]

Coyajee and *Nilkanth Atmaram*—for Appellants.

G. N. Thakor for *H. B. Gumaste* and *J. G. Rele*—for Respondent.

ORDER OF REFERENCE.

Pratt, J:—The plaintiff is one of three co-widows of Mallappa who died in 1916.

She filed this suit in 1917 to recover possession by partition of one-third share of her husband's estate.

The other two co-widows, Yellawa (defendant No. 2) and Tayawa (defendant No. 3 contended that Purshya, a son of Tayawa by a former husband, had been adopted by Mallappa in 1905. Purshya was dead, and his widow was the first defendant claiming to be sole heir through her husband.

Both the lower Courts have found that Mallappa married Purshya's mother in 1903 prior to the deed of adoption which is dated 6th December, 1905. If there had been an adoption it would have been invalid *Panchappa* v. *Sanganbasawa* (1). But both the lower

(1) (1899) 24 Bom. 89=1 Bom. L. R. 543.

Courts have also found it a fact that no adoption ever took place and that the deed was a sham transaction secretly executed in order to please Tayawa.

The first Court found that the suit was not barred by limitation, as the plaintiff had no knowledge of the adoption and the lower appellate Court seems to have concurred in that view.

In this appeal it is contended that plaintiff is affected with the knowledge that Mallappa had of the apparent adoption.

Under Article 118 the period of limitation is six years from the time when the alleged adoption becomes known to the plaintiff.

Under Section 2 of the Indian Limitation Act the word 'plaintiff' includes any person from or through whom a plaintiff derives his right to sue.

There can be no question but that plaintiff claims as heir of her husband and that her right to sue is derived from him. In the case of *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (2) the holder of an hereditary office was held to derive his right of suit from or through his father. Similarly an adopted son was held to derive his liability to be sued, within the meaning of the definition of defendant, from his adoptive mother: *Padajirav* v. *Ramrav* (3). So also as to judgment-debtor and auction-purchaser: *Ali Saheb* v. *Kaji Ahmad* (4). It follows, therefore, that if Article 118 applies, the suit is time-barred and plaintiff is deprived of her inheritance by reason of a deed of which she had no knowledge and which was never intended to be acted upon.

I think this conclusion is in itself sufficient to raise a serious doubt as to the correctness of the Full Bench ruling in *Shrinivas* v. *Hanmant* (5) applying Article 118 to suits for possession where the plaintiff cannot succeed without displacing an adoption.

This rule was first laid down by the Privy Council in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (6) under Article 129 of the Indian Limitation Act of 1871. That Article was as follows :—

Description of suit.	Period of limitation.	Time when period begins to run.
129. To establish or set aside an adoption.	12 years.	The date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father.

It was not very clear what was meant by the phrase "set aside an adoption" and the article was absurd for a Hindu widow had only to live twelve years after making of an adoption and the claim of the reversioner was barred unless he had taken the precaution of filing declaratory suit in her life-time.

However, in *Jagdamba's case* (6) the Privy Council held that this Article applied indiscriminately to suits for a declaration and to suits for possession.

In 1877 the Specific Relief Act was passed and Section 42 gave the Courts power to make declaratory decrees. Illustration (*f*) is as follows :—

"A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid."

The Limitation Act of 1877 was passed in the same year and for Article 129 of the Act of 1871 were substituted two Articles as follows :—

(2) (1899) 23 Mad. 271=27 I. A. 61=7 Sar. 671 (P. C.)

(3) (1888) 13 Bom. 160.
(4) (1891) 16 Bom. 197.
(5) (1899) 24 Bom. 260=1 Bom. L.R. 799(F.B).
(6) (1886) 13 Cal. 308=13 I. A. 84=4 Sar. 715 (P. C.).

Description of suit.	Period of limitation	Time when period begins to run.
118. To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	Six years	When the alleged adoption becomes known to the plaintiff.
119. To obtain a declaration that an adoption is valid.	Six years	When the rights of the adopted son, as such, are interfered with.

I think the effect of the legislation was to restrict the operation of Articles 118 and 119 to purely declaratory suits such as those described in Illustration (*f*). The period was reduced to six years in deference to a passage in the judgment of *Jagadamba's case* (6) suggesting that a moderate time should be allowed for litigation of the delicate and intricate questions involved in adoption. But suits for possession even where adoptions were involved do not fall under these Articles but must be governed by the twelve years rule under Article 141.

Alienations by Hindu widows give rise to questions as delicate and as intricate as adoptions. Nevertheless a suit for possession by a reversioner is governed by Article 141 even though a reversioner has filed no declaratory suit in the life-time of the widow under Article 125 corresponding to Illustration (*e*) to Section 42 of the Specific Relief Act.

After the passing of the Limitation Act, 1877 the case of *Mohesh Narain Moonshi* v. *Taruck Nath Moitra* (7) was decided by the Privy Council in 1892. The facts were simple. Shib Narain died in 1850. His widow made an invalid adoption in 1850 and died in 1884. The suit was brought in 1885 by a validly adopted son for possession of the estate. It was held following *Jagadamba's case* (6) that the suit was barred twelve years after 1851, *i.e.*, in 1863.

Then as to the contention that the suit having been brought in 1885 limitation should be decided with reference to the Act of 1877, Lord Shand held that the right of suit barred under the Act of 1871 was not revived by the Act of 1877; and that even if the latter Act were applicable it was more than doubtful whether the plaintiff would derive any advantage.

The same points arose again in the case of *Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (8) decided by the Privy Council in 1906. The Taluka which was the subject-matter of the suit had become the property of a lady the Thakurain Daryao Kunwar who made the apparent adoption of the defendants in 1858 and died in 1893. The heir was the lady's brother's grandson and he filed a suit in 1899. Lord Macnaghten said (p. 163):—

"Mr. Cohen, who argued the case with great ability, relied entirely on the Act of 1871. He contended that the limitation Act of 1877 did not apply because the appellant relied on title acquired before the passing of the Act of 1877, and his rights were therefore saved by Section 2 of that Act. He admitted that if the Act of 1877 applied, his client was out of Court.

"Their Lordships are unable to accede to Mr. Cohen's argument. Giving full effect to the *Jagadamba's case* (6) and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption amounts to acquisition of title within the meaning of Section 2 of the Act of 1877."

The *obiter dictum* in *Mohesh Narain's case* (7) that the Act of 1877 did not alter the period of limitation was treated as an *obiter dictum* and ignored.

Then as to Section 2 of the Limitation Act of 1877, that section is as follows:—

(7) (1892) 20 Cal. 487=20 I. A. 30=6 Sar. 261 (P.C.).

(8) (1906) 28 All. 727=33 I.A. 156=8 Bom. L. R. 722=9 O. C. 377 (P.C.).

"All references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed."

It refers (1) to plaintiffs' right of suit, and (2) to title acquired by the defendant.

Lord Shaw had said that as plaintiff had not filed a suit, which must have been a suit for declaration, his suit for possession was barred under the Act of 1871 and not revived by the Act of 1877.

Lord Macnaghten did not refer to the plaintiff's right of suit but said that defendant could not acquire title by omission to file a suit for a declaratory decree. But the necessary implication is that the right to sue for a declaration is distinct from the right to sue for possession, and this is directly contradictory to the *ratio decidendi* of Lord Shaw in *Mohesh Narain's case* (7).

I think the only conclusion from this judgment is that the Privy Council do not mean to follow *Jagadumba's case* (6) and that they do not regard suits for possession as suits for declaration where an adoption is disputed as subject to the same period of limitation. Indeed their Lordships seem to have made an express declaration to that effect in the case of *Umar Khan* v. *Niaz-ud-din Khan* (9) in the following passage:

"Although their Lordships consider that the question of an adoption was an immaterial issue they think it is advisable to say that the omission to bring within the period prescribed by Article 118 of the Second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property."

Now *Shrinivas* v. *Hanmant* (5) was based largely on *Jagadamba's case* (6) the *obiter dictum* of Lord Shaw in *Mohesh Narain's case* (7) and the other *obiter dictum* of the same Judge in *Luchman Lal Chowdhry* v. *Kanhya Lal Mowar* (10).

I think *Shrinivas* v. *Hanmant* (5) has been overruled by *Thakur Tirbhuwan Bahadur Singh's case* (8).

But the Division Bench of this Court ruled in *Shrinivas Sarjerav* v. *Balwant Venkatesh* (11) that *Shrinivas* v. *Hanmant* was not overruled.

In *Shrinivas Sarjerav* v. *Balwant Venkatesh* (11) Chandavarkar, J. distinguishes *Tirbhuwan's case* (8) on two grounds.

(1) The plaintiff was a minor until 1896 and brought his suit within three years of attaining majority and no knowledge could be imputed to him during his minority.

(2) The Thakurain was owner in her own right and there was no title in the adopted son till her death in 1893.

With all respect I venture to think that the first reason overlooks the fact that plaintiff claimed through his father and grandfather and must therefore be affected with their knowledge. And the second reason practically admits that the Act of 1877 has superseded *Jagadamba's case* (6). It made no difference that the Thakurain was full owner for the next heir could still have sued for a declaration. If the Act of 1871 had been law in 1896 plaintiff could not have sued in that year to dispute an adoption of 1858. But he succeeds under the Act of 1877 because the suit he could have filed in the lifetime of the widow could only have been declaratory and the defendant had acquired no title by lapse of time. Granted, but what about plaintiff's right to sue? His right to challenge the adoption barred already according to *Jagadamba's case* (6) and not revived according to *Mohesh Narain's case* (7). The Privy Council do not deal with this because they consider that Article 129 of the Act of 1871 is limited to declaratory suits only.

It is true that in *Malkarjun* v. *Narhari* (12), decided by the Privy Council in 1900, *Jagadamba's case* (6) was quoted with approval with reference to the applicability of Article 12 (*a*), to suits for possession. This Article uses the same phrase "setting aside" with reference to sale that Article 129 of the Limitation Act, 1871, did with reference to adoptions.

(9) (1911) 39 Cal. 418=39 I.A. 19, 25=14 Bom. L.R. 182 (P.C.).
(10) (1894) 22 Cal. 609=22 I.A. 51=6 Sar. 558 (P.C.).
(11) (1913) 37 Bom. 513=20 I.C. 162=15 Bom. L.R. 533.
(12) (1900) 25 Bom. 337=27 I.A. 216=2 Bom. L.R. 927=7 Sar. 739 (P.C.).

This identity of expression made a reference to *Jagadamba's case* (6) inevitable. But there is a distinction, for in the first place Courts are reluctant to disturb judicial sales and in the second place a sale without jurisdiction is null and void and does not affect limitation—*Khiarajmal* v. *Daim* (13) while the same principle cannot be applied to an adoption.

I venture respectfully to express dissent from Chandavarkar, J., that an *obiter dictum* of the Privy Council is binding on this Court. *Shrinivas* v. *Balwant, supra* (11). An *obiter dictum* is but an *obiter dictum* and has no authority however exalted the tribunal that utters it. There are *obiter dicta* on the one side in *Mohesh Narain's case* (7) and in *Luchmanlal Chowdhry's case* (10) and in *Malkarjun* v. *Narhari* (12) and on the other side in *Umar Khan's case* (9). But *Tirbhuwan Bahadur Singh's case* (8) involves a decision that the right to sue for a declaration that an adoption is invalid is a different right from the right to sue for possession of property affected by the adoption.

I would, therefore refer to a Full Bench the question whether in view of the Privy Council decision in *Thakur Tirbhuwan Bahadur Singh's case* (8), the decision in *Shrinivas* v. *Hanmant* (5) is still good law and whether suits for possession where the plaintiff cannot succeed except by displacing and alleged adoption are governed by Article 118 of the Indian Limitation Act.

Fawcett, J.:—I agree with the proposed reference to Full Bench. I think there are good grounds for such a reference, even though in *Bharma* v. *Balaram Sakharam* (14) a Division Bench took the same view as that taken in *Shrinivas Sarjerav* v. *Balwant Venkatesh* (11).

I was at first inclined to think that a distinction might be made between Mallappa's right to sue to obtain a declaration that the alleged adoption was invalid and the right of the plaintiff, his widow. If Mallappa sued, he did so because the setting up of the adoption was an infringement of Mallappa's rights, as a sole owner: see *Chinnasami Mudaliar* v. *Ambalavana Mudaliar* (15).

The plaintiff as his wife with contingent rights in property had, so to speak, an independent right to sue to set aside the adoption even during Mallappa's lifetime. This is on the principle that any person having a right in property, whether present or contingent, is entitled to come to a Court of Equity to complain of any attempt which may be made by a person having no authority to do so, to deal with the property in a mode which may ultimately harm him in the matter of his title: see *Beharee Lall* v. *Modho Lall* (16).

This is recognized in illustrations (*d*) to (*f*) of Section 42 of Specific Relief Act. Even before the Act was passed Westropp, C. J., laid down that the Legislature had recognised the right of a person to bring a suit to set aside an adoption as a substantive proceeding independent of any claim to property: see *Kalova* v. *Padapa* (17). But in so far as the plaintiff derives her right to sue from the fact of her having married Mallappa, it is difficult to say that the plaintiff in this case did not derive her right to sue from Mallappa within the meaning of Clause(*b*) of Section 2 of the Indian Limitation Act.

This view is strengthened by the decision in *Bhagwanta* v. *Sukkhi* (18) that, where there are several reversioners entitled successively under Hindu law to an estate held by a Hindu widow, no one of them derives his right to sue from the other, even though that other happens to be his father, but he derives his title from the last full owner. No doubt the definition in Section 2 only applies "unless there is anything repugnant in the subject or the context."

But I do not think there is anything in Article 118 which brings the case under this exception. Accordingly it seems to me that the appellants are right in their contention that the plaintiff is affected by the knowledge of Mallappa, and a case like this shows the absurdity that can arise from the view taken in *Shrinivas* v. *Hanmant* (5).

(13) (1904) 32 Cal. 296=32 I. A. 23=8 Sar 734 (P. C.).
(14) (1918) 43 Bom. 63=47 I. C. 639=20 Bom. L. R. 836.
(15) (1905) 29 Mad. 48.
(16) (1874) 21 W. R. 30.
(17) (1876) 1 Bom. 248.
(18) (1900) 22 All. 33=1900 A. W. N. 150

Macleod, C. J.:—One Mallappa Tammappa died in 1916 leaving three widows and no children. The plaintiff, one of the widows, sued her co-widows for partition. They were made defendants Nos. 2 and 3. The first defendant was the son of defendant No. 3 by her first husband. The defendants' answer was that Mallappa had adopted the first defendant in 1905 before he married defendant No. 3. The widows, therefore, were not the heirs of Mallappa. Defendant No. 1 had died after suit leaving a widow. The suit being brought more than six years after the adoption was barred by limitation. The issues in the trial Court were:

(1) Is it proved that the deceased first defendant was adopted by Mallappa?

(2) Is it proved that this adoption was before the re-marriage of defendant No. 3 to Mallappa?

(3) If not, is the adoption valid?

(4) Is the suit in time under Article 118 of the Limitation Act?

The trial Judge decided—

(1) that though Mallappa executed an adoption deed, no adoption took place;

(2) that defendant No. 3 was married to Mallappa in 1903;

(3) that the adoption, if it had taken place in 1905, was invalid;

(4) that as no adoption was proved and the passing of the adoption deed was kept secret, the plaintiff had no knowledge of any claim by the adopted son more than six years before suit.

Accordingly a decree for partition was passed.

In first appeal the learned Judge agreed with the trial Judge that no adoption had taken place. He thought that the issue of limitation was unnecessary, and, if it was, he was prepared to agree with the trial Judge. A second appeal was dismissed under Order XLI, Rule 11, but an appeal under the Letters Patent having been admitted, it came on for argument before Pratt and Fawcett, JJ.

Those learned Judges were of opinion that as under Section 2 of the Indian Limitation Act the word 'plaintiff' included any person from or through whom a plaintiff derived his right to sue, and the plaintiff claimed as heir of her husband, she was affected with the knowledge of the alleged adoption.

It would follow that if Article 118 of the Indian Limitation Act applied, the suit was barred, because Mallappa had executed an adoption deed which he never intended to be acted upon and of which plaintiff had no knowledge.

That such a conclusion would be possible would follow from the Full Bench decision of this Court in *Shrinivas* v. *Hanmant* (5) and the learned Judges were of opinion that so startling a result necessarily raised in their minds the doubt whether that decision was correct.

It would be all the more startling considering the peculiar facts of this case, for it has been found that Mallappa pacified the demands of defendant No. 3 that provision should be made for her son by her first husband by secretly executing a deed purporting to evidence an adoption, which had never taken place and which he must have known would be invalid if it had been made.

The decision in *Shrinivas* v. *Hanmant* (5) was to this effect, that where a plaintiff in a suit for possession of property is met by the claim of a defendant setting up a title as an adopted son, the plaintiff's suit is barred unless it is brought within six years of the date when the alleged adoption became known to the plaintiff.

The question referred to us is whether in view of the decision of the Privy Council in *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Baksh Singh* (8) the decision in *Shrinivas* v. *Hanmant* (5) is still good law, and whether suits for possession where the plaintiff cannot succeed except by displacing an alleged adoption are governed by Article 118 of the Indian Limitation Act.

It is necessary, therefore, to consider the facts of *Tirbhuwan's case* (8) since *Shrinivas* v. *Hanmant* (5) was not mentioned in the judgment, and it can only be said to have been overruled if at all by implication. Thakur Basant Singh was the last male owner of the *Taluqa* of Samarpaha.

He died in November, 1857 leaving his widow as his next heir. Thereafter a *Sanad* was granted to the widow and she became *Taluqdar* in her own right. She died intestate in 1893. The estate was claimed by Thakur Sher Bahadur as her son adopted after her husband's death. The plaintiff who attained majority in 1896 filed the suit in 1899 claiming to succeed as the grandson of the widow's eldest brother. Both the lower Courts held in favour of the plaintiff.

On appeal to the Privy Council it was argued that in any event there was an apparent adoption sufficient to satisfy the provisions of the Limitation Act of 1871 as interpreted by the Privy Council in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (6). It was admitted that if the Act of 1877 applied, the appellant-defendant had no case but it was argued that as the appellant relied on title acquired before the Act of 1877 was passed, his rights were saved by Section 2 of the Act of 1877.

That section is as follows:—

"All references to the Indian Limitation Act of 1871 shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed."

Their Lordships said at p. 163:—

"Their Lordships are unable to accede to Mr. Cohen's argument. Giving full effect to the *Jagadamba case* (6), and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption amounts to acquisition of title within the meaning of Section 2 of the Act of 1877."

To appreciate the full meaning of the decisive passage of the judgment it will be necessary to follow the history of the case in the lower Courts and the arguments of counsel before the Privy Council.

In the trial Court it was argued that the suit was barred by Article 118, Schedule II, of the Limitation Act of 1877 as the adoption of the defendant became known to the plaintiff and his ancestors more than six years before the institution of the suit. After referring to *Jagadamba's case* (6) and *Mohesh Narain Moonshi* v. *Taruck Nath Moitra* (7) the learned Judge said (p. 108):—

"The above decisions were given with reference to Article 129 of the old Act of 1871. It is contended on behalf of the defendant that the principle enunciated in the above rulings is applicable to cases governed by the existing law."

Then after referring to *Parvathi Ammal* v. *Saminatha Gurukal* (19) and *Shrinivas* v. *Hanmant* (5), which adopted that view, and the numerous decisions to the contrary, he continued (p. 159):—

"There seems to be a consensus of opinion in most of the High Courts that Article 118 of the present Act does not apply to suits for possession and I do not think we are justified in departing from it without the distinct authority of the Privy Council."

The Court of the Judicial Commissioner of Oudh concurred in this view. Before the Privy Council Mr. Cohen argued for the appellant that Act IX of 1871 applied, and as no suit had been filed within the time fixed by Article 129 of Schedule to that Act the validity of the adoption could not be questioned in the plaintiff's suit. The principle laid down in *Jagadamba's case* (6), that when a suit to set aside an adoption was barred, so also was any suit which in order to succeed must first get rid of the adoption, applied equally to Article 118 of the Schedule II to the Act of 1877.

Mr. DeGruyther for the respondent argued that the suit was governed by Article 143 of Schedule II of Act XV of 1877. Article 118 differed in its terms from Article 129 of the earlier Act and did not apply to a suit for possession. There had been no acquisition of title by the appellant in virtue of an apparent adoption within the meaning of Section 2 of the Act of 1877. Nor could it be laid down under Act XV of 1877 that

(19) (1896) 20 Mad. 40=36 M. L. J. 272.

a plaintiff must sue for a declaratory decree before suing for possession, and that his suit for possession was barred if a declaratory action was barred.

It will be seen, therefore, that the appellant, though he mainly relied on the contention that he had acquired a title under the Act of 1871, and that title was preserved by Section 2 of the Act of 1877, also contended that the principle laid down in cases under Article 129 of the Act of 1871 applied to cases under Article 118 of the Act of 1877 and that the suit was barred on that ground, *Shrinivas* v. *Hanmant* (5) being relied upon in Mr. Cohen's reply. No doubt the suggestion that the immunity gained by the appellant by the lapse of six years, without a declaratory suit being filed, amounted to acquisition of title was too fanciful to demand any attention.

It would seem, therefore, obvious to me that their Lordships having before them all the arguments which have been raised before us in this reference on behalf of the appellant deliberately adopted the contrary view as contended for by the respondents.

And as if that had not been made sufficiently clear in the judgment, their Lordships in *Umar Khan* v. *Niaz-ud-din Khan* (9) referred to *Tirbhuwan's case* as laying down that the omission to bring within the period prescribed by Article 118 of the Second Schedule of the Indian Limitation Act of 1877 a suit to obtain a declaration that an alleged adoption was invalid or never in fact took place was no bar to a suit for possession of property.

A Division Bench of this Court in *Shrinivas Sarjerav* v. *Balwant Venkatesh* (11) came to the conclusion that the decision in *Shrinivas* v. *Hanmant* (5) had not been overruled by the Privy Council. The referring judgment of Pratt, J. analyses the reason given for that conclusion and points out the fallacies which underlie them. As a matter of fact when the Court was of opinion that the adoption of the defendant was valid the question of limitation became academical.

I shall not discuss in detail the reasons given by the learned Judges, for I agree with what has been said by Pratt, J. I have already pointed out that their Lordships of Privy Council, having all the arguments before them which have been from time to time raised in this Court, came to a conclusion absolutely inconsistent with those reasons, and I see no object in referring to various passages in the judgments in other cases as showing that their Lordships could not have meant what they said in *Tirbhuwan's case* (8).

What their Lordships did mean is clearly enunciated in *Umar Khan's case* (9). Whatever the nature of the adoption in that case and whatever its effect might be on the status of the person adopted, it was an adoption within the meaning of the word in Article 118 of Act XV of 1877, and if it was set up as a defence to a suit for possession, the omission to bring a declaratory suit within six years was no bar to the suit for possession.

I think the question can also be considered from another point of view. The Limitation Act is an act for the limitation of suits, prescribing the period within which suits asking for various reliefs can be brought. In a suit for possession on title, the only answer by the defendants which can be successful is a better title than that proved by the plaintiff, and such a title may be obtained by adverse possession. An adoption may be the origin of such a title being acquired, but the defendant may succeed in his title by adverse possession and not by virtue of his adoption.

But if his title depends on adoption apart from the question of adverse possession, he may succeed by proving his adoption and the question of the limitation of plaintiff's suit does not arise, provided it is brought within the period prescribed for the particular suit he has brought. For the plaintiff is in the position of a defendant when he is resisting a claim by adoption and there is no bar of limitation to a defence. The mere fact that an adoption alleged to have taken place is not challenged does not set time running in favour of the adopted son, so that he may acquire a title unless he is in possession.

Then if he is sued he can either say 'I have been in possession for twelve years' or 'I am an adopted son and I have a better title than the plaintiff.' It is then open to the plaintiff to say 'your adoption as a matter of fact never took place or, if it did, it is invalid.'

Lastly, I may refer to the following decisions of the High Courts of Calcutta,

Madras and Allahabad: *Ram Chandra Mukerjee* v. *Ranjit Singh* (20); *Natthu Singh* v. *Gulab Singh* (21); *Velaga Mangamma* v. *Bandlamudi Veeraya* (22), which are opposed to the view taken by this Court in *Srinivas* v. *Hanmant* (5). The judgment in *Ve'aga Mangamma* v. *Bandlamudi* (22) shows that the learned Judges were clearly of opinion that the Privy Council in *Tirbhuwan Bahadur Singh's case* (8) overruled the view that a suit for possession where the validity of an adoption has to be determined is governed by Article 118 of the Act of 1877.

I would, therefore, answer both parts of the question referred to us in the negative.

Shah, J.:—The question referred to the Full Bench is whether in view of the Privy Council decision in *Thakur Tirbhuwan Bahadur Singh's case* (8) the decision in *Shrinivas* v. *Hanmant* (5) is still good law and whether suits for possession where the plaintiff cannot succeed except by displacing an alleged adoption are governed by Article 118 of the Limitation Act.

My answer is that *Shrinivas* v. *Hanmant* (5) is not overruled by *Tirbhuwan Bahadur Singh's case* (8), that it is still good law in this Presidency, and that Article 118 would apply to suits for possession where there is a title by adoption to be displaced to the extent indicated in *Shrinivas* v. *Hanmant* (5).

We are not concerned in this reference with the questions whether on the finding of the lower appellate Court the rule in *Shrinivas* v. *Hanmant* (5) is applicable to the present case and whether on those facts the suit would be barred under Article 118. I express no opinion thereon as they are points for the Division Bench to decide.

I desire to state briefly my reasons for the answer to the question referred to us.

In the first place in *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (8) their Lordships do not in terms purport to overrule *Jagadamba Chowdhrani* v. *Dakhina Mohun* (6) and the other cases which followed it, among which the case of *Shrinivas* v. *Hanmant* (5) must be included. That case was decided on the ground taken by the counsel for the appellant whether the alleged adoption was or was not an apparent adoption to which the ruling in *Jagadamba's case* (6) would apply if the Act of 1871 were then in force. Their Lordships hold in that case that giving full effect to *Jagadamba's case* (6) and the other cases which followed it they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption, amounts to acquisition of title within the meaning of Section 2 of the Act of 1877.

That is the point which they decided and I am slow to accept the view, that if their Lordships meant to overrule *Shrinivas* v. *Hanmant* (5) they would have left it to implication as to which there is so much doubt and difficulty.

In other words unless the implication is clear, I think that it would not be right to treat the decision in *Shrinivas* v. *Hanmant* (5) as overruled.

I do not think that the implication is by any means clear. The suggested implication is based upon the consideration that it was conceded in the argument by the counsel for the appellant in that case that the Act of 1877 did not apply, and admitted that he was out of Court if the Act of 1877 applied. The difficulty of inferring from this circumstance that their Lordships meant to overrule *Shrinivas* v. *Hanmant* (5) is clear from the judgment in *Shrinivas Sarjerav* v. *Balwant Venkatesh* (11) followed in *Bharma* v. *Balaram Sakharam* (23).

I do not for the moment say anything as to the correctness of the view accepted in these two decisions as regards the effect of the decision of the Privy Council in *Tirbhuwan Bahadur Singh's case* (8). But the implication, such as it is, is by no means so clear as to give rise to no doubt or difficulty. Where that is the case I do not think that it is right to treat a Full Bench decision or any decision as overruled by implication.

(20) (1899) 27 Cal. 242=4 C. W. N. 405.
(21) (1895) 17 All. 167=1895 A. W. N. 36.
(22) (1907) 30 Mad. 308=17 M. L. J. 182.
(23) (1918) 43 Bom. 63=20 Bom. L. R. 836.

Secondly, on the merits I feel by no means clear that their Lordships meant to overrule *Shrinivas* v. *Hanmant* (5). The adoption in that case was not the ordinary adoption which, according to the Hindu law, gives title but it was really a nomination of an heir and an adoption only in the popular sense. It is possible that that circumstance may have influenced the counsel for the appellant in taking up the position with reference to the Act of 1877 that he did. Then the facts in that case were so special that I think it is entirely unsafe to hold that because it was admitted in that case that if the Act of 1877 applied, the defendant was out of Court, their Lordships meant to overrule *Shrinivas* v. *Hanmant* (5).

It is possible to attribute that admission to other grounds and after giving the point my best attention, I am unable to hold that in view of *Tirbhuvan Bahadur Singh's case* (8), *Shrinivas* v. *Hanmant* (5) should be treated as overruled.

I do not think that the observations in *Umar Khan* v. *Niaz-ud-din Khan* (9) which have been relied upon, have any such effect. Those observations were made in a case in which the parties were Mahomedans and their Lordships distinctly point out that under the general Mahomedan law an adoption cannot be made; an adoption if made in fact by a Mahomedan could carry with it no right of inheritance. The preceding observations relating to Article 118 are applicable to a suit for possession like the one which their Lordships had to deal with in that case in which an alleged adoption carried with it no right of inheritance; at least the observations are capable of being read in that sense, and were read in that sense, in *Shrinivas Sarjerav* v. *Balwant Venkatesh* (11).

It is significant that in *Tirbhuvan Bahadur Singh's case* (8) their Lordships had to deal with an adoption in the popular sense and not one which would carry with it any title to property, and the reference to that case in *Umer Khan's case* (9) when looked at in the light of the context is capable of being read in that sense.

Thus, on the whole, it is clear to my mind that *Shrinivas* v. *Hanmant* (5) cannot be treated as overruled and must be accepted as good law.

As regards the second part of the question I admit that it is desirable that there should be uniformity in the decisions on a point of this character as far as possible in different High Courts and it is clear that the other High Courts have not accepted the view taken in *Shrinivas* v. *Hanmant* (5). That, however, is a general consideration of importance but necessarily of limited application.

I do not think that it would be right to disturb a rule of limitation affecting title to property, deliberately laid down so far back as 1899, and consistently followed during all these years in this Presidency on such a general ground. It seems to me that the main purpose of this reference is to settle the question as to whether *Shrinivas* v. *Hanmant* (5) is overruled by the decision in *Tirbhuwan Bahadur Singh's case* (8) and not to invite a reconsideration of the decision of the Full Bench in that case. It seems to me that the final word on this point must come either from the Legislature or from the Privy Council. We are informed that the question as to the correctness of *Shrinivas* v. *Hanmant* (5) arises in an appeal from this Court to the Privy Council, which has been admitted, and in which the point is likely to be decided. The present state of the decisions is embarrassing to those whose rights are affected by the application of the rule in *Shrinivas* v. *Hanmant* (5).

I do not consider it necessary to re-examine the whole subject with a view to consider whether *Shrinivas* v. *Hanmant* (5) has been rightly decided. Under the circumstances I think that the rule in that case should be applied so far as it may be applicable to the facts of any particular case.

Fawcett, J. :—I agree with the learned Chief Justice that both parts of the question referred to the Full Bench should be answered in the negative. I concur generally in his reasons and will abstain from adding to the great quantity of literature on the point, in which the arguments *pro* and *con* are fully stated. In brief, I believe that the Privy Council *did* intend in *Tirbhuvan Bahadur Singh's case* (8) to decide the point that had been fully argued before them, whether, the principle of *Jagadamba's case* (6) was applicable to cases governed by the Limitation

Act of 1877, Article 118. I think, therefore, that we should fall into line with all the other High Courts in India and cease to give effect to the view taken in *Shrinivas* v. *Hanmant*.

Answer in the negative.

A. I R. 1922 Bombay 233.

PRATT AND FAWCETT, JJ.

Doddava Konu Parahya and others—Defendants-Appellants

v.

Yellawa Konu Yallappa Ninni—Plaintiffs-Respondents.

Letters Patent Appeal No. 91 of 1920, decided on 6th March, 1922.

(a) *Practice—New plea—Plea abandoned at earlier hearing cannot be raised later on.*

Where at an earlier hearing a party abandons any point he cannot be allowed afterwards to take it up. [P. 233, C. 2.]

(b) *Legal Practitioner — Admission by—Parties are bound unless counsel was misled by mistake.*

Parties are bound by admissions of counsel, unless he has been induced or misled by some circumstances to make a statement under a mistake. [P. 234, C. 1.]

(c) *Civil P. C., S. 100—Question of law depending on evidence cannot be raised.*

A question of law depending on evidence cannot be raised in second appeal for the first time. [P. 233, C. 2]

(d) *Evidence Act, S. 102—Evidence on both sides let in*—Onus *is immaterial.*

Where both parties have let in evidence the incidence of *onus* is an academic question which does not affect the conclusion, [P. 233, C. 2.]

Nilkanth Atmaram—for Appellants.

G. N. Thakore, I. G. Rele and *H. B. Gumaste*—for Respondents.

[After the decision of the point referred to the Full Bench reported on p. 223 the following judgment was delivered.]

Pratt, J.:—The Full Bench have now decided that the limitation of the suit is not governed by Article 118, and the suit therefore is not barred by limitation. Mr. Nilkanth Atmaram however now attempts to attack the judgment of the District Court on two grounds, first, that the plaintiff is estopped from challenging the adoption made by her husband through whom she claims, and secondly, that the *onus* of proof is placed upon the appellant on the issue as to factum of the adoption.

It will be convenient to take the second point first. Both the lower Courts have found that as a matter of fact no adoption ever took place and that the deed was a sham transaction secretly executed merely to please the natural mother Yalawa. This is a finding of fact which the appellant cannot challenge in appeal, but he seeks to do so on the ground that the *onus* of proof on that issue was wrongly thrown upon him. But as both parties have called evidence on this issue the incidence of the *onus* is an academic question which does not affect the conclusion. The conclusion therefore stands that there was in fact no adoption and if there was in fact no adoption, it is impossible to see how the plaintiff can be affected by any estoppel. Both these points however are not open, for when the appeal was first argued by Mr. Coyajee, he took his stand clearly on the point of limitation which now has been decided against him. I would therefore confirm the decree of the lower appellate Court and dismiss the appeal.

On the question of costs, Mr. Nilkanth Atmaram appeals to the Court not to make him pay the costs of the other party on the ground that he was misled by the ruling in *Srinivas* v. *Hanumanth* (1). But I do not think that there is any reason for depriving the respondent of the benefit of the ordinary rules that costs should follow the event.

Fawcett, J.:—In regard to the point of estoppel which is now suggested, that is raised for the first time and he could only succeed if the evidence brought the case within the terms of Section 115 of the Evidence Act. It would be necessary to inquire whether the admission of Mallappa in the adoption deed, that he had duly adopted defendant No. 1, had led the defendant to believe that to be true and to act upon that belief to his prejudice. These are questions of fact which, it seems to me, cannot be decided on the record as it stands, there having been no issue raised on the point. The contention, therefore, fails under the ordinary rule that a point of law which cannot be decided without further evidence may not be raised in second appeal *Gavadappa* v. *Girimallappa* (2).

In any case I agree with my learned brother that, inasmuch as Mr. Coyajee at the first hearing of this appeal abandoned all other points except his contention that the suit was barred by limitation, the appellant cannot now be allowed to go behind that admission. He had power

(1) (1910) 24 Bom. 260=1 Bom. L. R 799.
(2) (1895) 19 Bom. 331.

to abandon other issues that might have been raised in the appeal. *Venkata* v. *Bhashyakamlu* (3). Parties are bound by their counsel's admission, unless he has been induced or misled by some circumstances to make a statement under a mistake. Here there had been no such mistake.

It is urged that Mr. Coyajee gave up the other points under the assumption that the law laid down in *Shrinivas* v. *Hanmant* (1) would be accepted by the Court. No doubt that may have been one of the reasons for his confining his case in the way he did. But the assumption that the Court would follow the ruling in *Shrinivas* v. *Hanmant* (1) is not one that he was entitled to make, and he took the risk of the Courts' making the reference to a Full Bench which actually ensued. It is obviously undesirable that that reference should be entirely stultified by the appellant now being allowed to go into points which, if decided in his favour, will render the reference and the ruling of the Full Bench ineffective as mere *obiter dictum*.

Therefore, I agree, that in consequence of that ruling, the appeal should be dismissed with costs.

Appeal dismissed.

(3) (1902) 25 Mad. 367=29 I. A. 6=8 Sar. 258 (P.C.).

A. I. R. 1922 Bombay 234.

MACLEOD, C. J. AND COYAJEE, J.

Keshav Raghunath Joshi—Plaintiff-Appellant

v.

Gafurkhan Daimkhan Bulere—Defendant-Respondent.

S. A. No. 425 of 1921, decided on 20th January, 1922, from a decision of Dt. J., Thana in A. No. 342 of 1920.

Limitation Act (1908), Art. 134—Transfer by mortgagee as owner—Purchaser for value without notice—Subsequent knowledge by the transferee will not stop limitation running.

Defendant No. 1 with whom plaintiff's predecessor-in-title mortgaged certain lands, sold as owner the land to defendant No. 2 who was a purchaser for value without notice and gave him possession. Defendant No. 2 came subsequently to know that defendant No. 1 was only a mortgagee and not the owner of the land. In plaintiff's suit, after 12 years of the transfer, for redemption:

Held; It was barred under Article 134 of the Indian Limitation Act. Unless direct provision is made in the Act, that on the acquisition of such knowledge the time which had previously begun to run against the mortgagor should stop it is difficult to say that the later knowledge on the part of the transferee would prevent time running in his favour. [P. 234, C. 2.]

P. B. Shingne—for Appellant.

Pendse with *V. D. Limaye*—for Respondent No. 1.

Macleod, C. J.:—The plaintiff sued to recover by redemption possession of the plaint property. The property had been mortgaged with possession in 1891 by one Ganpat Bhiva Chavan for himself and as guardian of his minor nephew Krishna Babaji Chavan to the first defendant's father Martand. The equity of redemption eventually came to two girls, Kondi and Niri, from whom the plaintiff purchased in 1918.

In 1902, Martand sold the property to the second defendant purporting to be the owner thereof, and the second defendant has since been in possession.

It is clear then that any suit against the second defendant to recover possession of the suit property must fall under Article 134 of the Indian Limitation Act if it is not filed within twelve years from the date of the transfer. But the appellant wishes to rely on the fact that within a few months of the transfer, the second defendant acquired the knowledge that Martand was a mortgagee and not an owner. Defendant No. 2 stated that he asked Martand why he sold the property if he was only a mortgagee, and Martand said he had become the owner in pursuance of an agreement, which he promised to give to the second defendant later on. Whether that story is true or not, the Indian Limitation Act makes no provision for the case of a transferee who gives valuable consideration at the time of transfer from an ostensible owner, but finds later on that his transferor was only a mortgagee, and not owner of the property transferred.

There does not seem to be any direct authority on this point. But unless direct provision is made in the Act, that on the acquisition of such knowledge, the time which had previously begun to run against the mortgagor should stop, it is difficult to say that the later knowledge on the part of the transferee would prevent time running in his favour. Good faith is no longer required on the part of the transferee. Article 134 of the Indian Limitation Act, XV of 1877

had the words "and afterwards purchased from the trustee or mortgagee for a valuable consideration," while in the present Article 134 the words are "and afterwards transferred by the trustee or mortgagee for a valuable consideration."

In *Bagas Umarji* v. *Nathabhai Utamram* (1) it was pointed out that the alteration in the language of Article 134 of the Indian Limitation Act (IX of 1908) was a "legislative recognition of the soundness of the view that the Article was intended to give protection to all transferees for value including mortgagees." Therefore the appeal must be dismissed with costs.

Coyajee, J.:—I agree that in the present state of the law it is difficult to give effect to the contention raised on behalf of the appellant, namely, that five or six months after the purchase the second defendant obtained the mortgage-deed itself from Martand and that therefore he had knowledge of the nature of his vendor's rights. The learned District Judge in this connection observes:—

"There is, however, nothing to show, and no good reason to believe that the recitals in his sale-deed were made in collusion with him and the mortgage-bond was handed over to him at the time the sale-deed was passed and not subsequently as stated by him. On the whole, therefore, I find upon the strength of the recitals in the sale-deed, that the mortgagee Martand had purported to sell the land as his absolute proporty and defendant No. 2 had purchased it as such. That being so, the case is governed by Article 134 of the Indian Limitation Act."

The learned Judge is right. When a mortgagee sells the mortgaged property as an ostensible owner and there is valuable consideration for the sale, the right of the purchaser becomes unassailable by the mortgagor by the lapse of twelve years from the date of the purchase. The mortgagee may be dishonest, the purchaser may not make any enquiry as to his vendor's title; the mortgagor may be ignorant of the sale of his property by the mortgagee: these facts no longer affect the rights of the purchaser who has given valuable consideration. Article 134 of the Indian Limitation Act (IX of 1871) required "good faith" on his part. That condition was, however, removed by Act XV of 1877 and is not re-imposed by Act IX of 1908.

The language of the enactment now in force being clear, the plaintiff's suit must fail.

Appeal dismissed.

(1) (1911) 36 Bom. 146=13 Bom. L.R. 1057=12 I.C. 737.

A.I.R. 1922 Bombay 235.

MACLEOD, C. J. AND COYAJEE, J.

Jayant Bapsha Savant—Defendant-Appellant

v.

Abdul Rahiman Mahomed Ibrahim—Respondent.

S. A. No. 676 of 1920, decided on 9th January, 1922, from a decision of Asst. J., Thana in Appeal Nos. 97 and 107 of 1920.

Land Tenure — Khoti *lands* — Khoti Nisbat *lands*—Khoti Khasgi *lands—Purchaser of, is liable to pay* Faida.

A purchaser of *Khoti Khasgi* lands from one of the co sharers *Khots*, would be liable to pay *Faida* unless he was able to show that by virtue of some custom or agreement amongst the *Khots* the *Faida* was not payable.

N. V. Gokhale—for Appellant.

V. B. Virkar—for Respondent.

Macleod, C. J.:—The plaintiff alleged that he was a co-sharer *Khot* of the suit village of Bhandivli; that he managed the suit village in the years 1914-15, 1915-16, 1916-17 and 1917-18; that a *Khoti Khata* stood in the defendant's name; and that the defendant did not pay *Dhara* and *Faida* for those lands. The defendant *inter alia* contended that for some lands in suit he was liable to pay only *Dhara* and local cess; and the main issue in the suit was whether for those lands he was liable to pay the *Faida*.

In the trial Court the learned Judge points out that a *Khot* in respect of his *Khasgi* lands is a tenant to himself so far as his liability to the body of *Khots* is concerned. With regard to *Khasgi* lands, I understand, the position is that the holder is still liable to pay *Faida* to the general body of the *Khots*, and that this payment of *Faida* for various *Khasgi* lands held by various co-sharers in the ordinary course would be adjusted when the division of profits is made among the joint body of the *Khots*.

The defendant, as a purchaser of *Khoti Khasgi* lands from one of the co-sharers

Khots, would be liable to pay *Faida* unless he was able to show that by virtue of some custom or agreement amongst the *Khots* the *Faida* was not payable. That was a matter to be proved by evidence, and as the learned Judge points out no evidence whatever was adduced. The fact that the defendant produced four sale-deeds, under which the defendant bought *Khoti Khasgi* lands, which were alleged to be immune from the payment of *Faida*, would not be relevant unless it could be shown that the general body of *Khots* had agreed to those terms. The plaintiff's claim was, therefore, decreed in the trial Court, and this decision was confirmed in appeal.

The learned appellate Judge relied upon the decision in *Raghunathrao* v. *Vasudev* (1) that a *Khoti* sharer, if he sold his *Khoti Khasgi* lands, lost his rights thereto as against the general body of the *Khots*, and if after the sale he remained in possession of such lands, he was a tenant-at-will and could be ejected ; and the head-note also says that if a *Khoti* sharer parts with his *Khoti Khasgi* lands, then those lands, in the hands of an outside purchaser become *Khoti Nisbat*, that is to say, the purchaser not being a member of the body of *Khots* cannot hold any lands as "*Khoti Khasgi*" as that expression refers only to lands in the occupation of a *Khot* and cultivated by him or by his hired labourers. It is clear, therefore, that these lands in the possession of the purchaser are liable to pay *Faida* under the arrangement which was made in Exhibit 29, whereby it was arranged that the tenants of *Khoti Nisbat* lands were to pay Re. 1 assessment and As. 8 *Faida*.

Therefore the decision of the Court below is correct and the appeal must be dismissed with costs.

Coyajee, J.:—I concur. The defendant's plea, so far as it appears on the evidence, seems to be that he is not liable to pay *Faida* in respect of the *Khoti Khasgi* lands now in his possession. This plea was disallowed by both the lower Courts, and in my opinion, for sufficient reasons. The lands in question are not *Dhara* lands. They are *Khoti Khasgi* lands which are thus explained by Mr. Justice Ranade in *Secretary of State for India* v. *Narayen Namshet Kamrekar* (2).

"*Khoti Khasgi* lands have been thus defined in Mr. Justice Candy's book on *Khoti* Tenure. 'All land in a *Khoti* village, which is not *Dhara*, must be *Khoti*. The *Khoti* lands which are cultivated by the *Khot* himself, or by means of hired labourers are called *Khoti Khasgi*, and the rest is *Khoti Nisbat*, and may be sub-let to permanent tenants or to recent cultivators."

Now all *Khoti* lands are liable to pay *Faida*, that is, the *Khot's* profits. It constitutes his remuneration for the trouble and risk of collecting the revenue of the village, and managing the village. *Khoti Khasgi* lands are not exempt from such imposition. When the *Khoti Vatan* is held by one single individual, he is, so to say, his own tenant as regards the *Khoti Khasgi* lands in his private occupation. The position as regards the payment of this *Faida* becomes clearer when such *Khoti Vatan* is held by a body of sharers. In that case each sharer holding *Khoti Khasgi* lands becomes a tenant of the co-parcenary and pays *Faida* to the whole body of *Khots* including himself ; and when a *Khoti* village is taken under attachment by Government, the *Khot* is liable to be assessed for *Khoti Faida* in respect of lands in his private occupation *Ramchandra Narsinha Mahajan* v. *Collector of Ratnagiri* (3) and *Ramchandra Daji Joshi* v. *Visaji Bapuji Kanhere* (4).

It was no doubt open to the defendant in this case to prove that this particular *Khoti* land had been the subject of a special agreement between his vendor *Khot* and his co-sharers. The burden of proving it lay on him. No such agreement, however, has been either alleged or proved in this case. The learned trial Judge pointed this out when he said "defendant has not adduced any evidence to show that he is not liable to pay *Faida* to plaintiff in virtue of any custom, or agreement."

In these circumstances, in my opinion the decree of the lower Court is right.

Decree affirmed.

(1) (1899) 23 Bom. 769=1 Bom. L. R. 436.

(2) (1899) 23 Bom. 518=1 Bom. L.R. 19.
(3) (1870) 7 B. H. C. R. (A. C. J.) 41.
(4) (1880) P. J. 297.

A. I. R. 1922 Bombay 237.

MACLEOD, C. J. AND COYAJEE, J.

Hanmant Timaji Desai and others—Defendants-Appellants

v.

Raghavendra Rao Gururao Desai—Plaintiff-Respondent.

F. A. No. 157 of 1921, decided on 17th January 1922, from a decision of 1st Class Sub-Judge, Dharwar in Darkhast No. 399 of 1920.

(a) *Limtation Act, Art. 182, Cl 7—Instalment, non-payment of—Subsequent payments of other instalments — Appropriation — Earlier instalment must be deemed paid off,*

It is the duty of the Court when instalments are paid to appropriate them to the earliest instalment unpaid, unless at the time the payment is made the instalment is already barred by limitation. [P 238, C, 1.],

(b) *Mortgage—Decree—Remedy against property alone given—Decree cannot be executed personally—C, P. C., O. 34, R. 14*

Where a decree only gives the mortgagee a remedy against the mortgaged properties the only way in which the mortgagee can recover his money is by sale of the mortgaged property, if the personal remedy on the money claim against the mortgagor is barred. [P. 238, C, 1.]

(c) *Civil P. C., O. 34, R. 14—Personal remedy barred—Instalment decree providing for sale of property in case of default—Application for sale dismissed as premature—Maintainability of suit for sale is doubtful.*

Where at time when personal remedy would be barred by limitation, an instalment decree is passed on an award in a mortgage suit and the decree contains a default clause entitling the decree-holder to execute the decree and bring the property to sale and where such an application for execution is dismissed as being premature it is very doubtful if it will be a correct reading of Order 34, Rule 14 to hold that a suit may be brought for the recovery of the amount by sale of the property [P, 237, C, 2].

N. V. Gokhale—for Appellants.

A. G. Desai—for Respondent.

Macleod, C.J.:—The plaintiff obtained a decree on an award on the 8th October, 1915, whereby it was directed that the defendants should pay to the plaintiff Rs. 14,000 by eleven instalments; that the first, ten instalments were to be paid by annual instalments of Rs. 1,300 each, and the last instalment was to be one of Rs. 1,000; that the defendants should pay the instalment every year on 1st August to the plaintiff, that the first instalment was to be paid on 1st August, 1916; that if the defendants failed to pay any two instalments out of the said instalments, the said two instalments should be paid within six months from the date of default to pay the second instalment, and that in case of failure to pay the said two instalments within six months accordingly, the plaintiff should recover the whole amount of the said two instalments and the future instalments that remained unpaid on that day, and costs, by sale of the property mentioned in the deed of mortgage without possession.

The date of the mortgage on which the decree was passed was 8th September, 1904. It is quite clear that any personal remedy against the mortgagor would be barred by limitation. The first instalment was paid on the 1st August 1916, but the second one not having been paid the plaintiff applied in July 1918 for execution of the decree by selling a portion of the mortgaged property to realize the amount of the second instalment.

The defendant contended that the property could not be sold unless two instalments were in arrears and the matter came up to the High Court on appeal from the decision of the Subordinate Judge allowing execution to proceed: *Hanmant* v. *Raghavendra* (1). It was held that the application for execution was premature. But from the judgment of Mr. Justice Shah it might be inferred that the Court was of opinion that a suit might have been filed to recover Rs. 1,300 the instalment due, and in that suit a decree might be obtained for sale of the mortgaged property or sufficient to satisfy the payment of the instalment in arrear. With due respect we doubt very much if that was a correct reading of Order XXXIV, Rule 14, Civil Procedure Code.

But at present we are concerned with later Darkhast taken out by the plaintiff by which he sought to recover the instalment which fell due on the 1st August, 1917 by attaching other property of the defendant, namely, the decree which he had obtained against one Shrinivas Murhar in the Court of Haveri. The Judge said "the most important question which I have to decide is, therefore, whether plaintiff can proceed now against the persons of the defendants, or their property other than that mortgaged to him in Exhibit 4," and he found that the plaintiff was entitled to recover the amount claimed either from the persons of the defendants or from any of the property of their excepting the mortgaged property in Exhibit 4.

It was eventually found that the decree which was attached had been fully satisfied. Therefore in the ordinary course the Darkhast would fall to the ground. But the point decided against the defendants was that in the case of any one instalment remaining unpaid after the due date, the plaintiff could execute against the persons of the defendants or against any property

(1) (1920) 44 Bom. 981=58 I.C. 221=22 Bom L.R. 650.

belonging to them, other than the mortgaged property. That is an important question, and it appears to us that it was wrongly decided by the Court below.

It seems clear that where the decree only gives the mortgagee a remedy against the mortgaged porperty, the personal remedy on the money claim against the mortgagor being barred, the only way in which the mortgagee can recover his money is by sale of the mortgaged property. The decree directs that execution should only issue against the mortgaged property in the event of two instalments being in arrears for six months, and it may be that if one instalment remains in arrear, and the plaintiff may be running the risk of losing that instalment, he would be entitled to file a suit for payment of that instalment, which could be recovered by sale of the mortgaged property; and it seems if the decree is construed strictly that would be the only way in which he could recover the last instalment, the others having been duly paid, since it could not be said that two instalments were in arrears, as that was the sole condition under the decree on which the sale could be directed.

However it is not necessary to decide that point at present. But it seems that although four instalments had been paid under the decree, the last three instalments had been credited to the instalments for 1918, 1919 and 1920, leaving the instalments for 1917 still unpaid. The result might be that recovery of that instalment, if the remaining instalments were paid according to due dates, would become barred entirely, and we do not think that that was the intention of the Court when the decree was drawn up. It would be the duty of the Court, when instalments are paid, to appropriate them to the earliest instalment unpaid. The debtor cannot allow such earlier instalments to remain unpaid, unless at the time he makes the payment the instalment was already barred by limitation.

It seems to us, therefore, that this decree should be considered as if instalments up to 1919 had been paid, and the instalment for 1920 remained due. Any instalment paid hereafter will be appropriated according to date, so that as soon as two consecutive instalments are in arrears, then the plaintiff will be entitled to execute by sale of the mortgaged property. The appeal will be allowed and the Darkhast will be amended according to this judgment so as to show that the instalment for 1920 is in arrear and not the instalment for 1917. The fresh Darkhast now filed should also be amended according to this judgment. The appellant to get costs of the appeal.

Appeal allowed.

*A.I.R. 1922 Bombay 238.

MACLEOD, C. J. AND SHAH, J.

Ramachandra Venkatesh Sholapure—Applicant

v.

Shrinivas Krishna Kulkarni — Opponent.

Civil Extraordinary Application No. 43 of 1921, decided on 3rd November, 1921, from an order of Sub-J. Bagalkot.

Civil P. C. (1908), Sec. 11—Execution proceeding—Application dismissed as time barred—Subsequent application relying on a valid acknowledgment is not barred.

The dismissal of an application for execution as out of time does not prevent the executing plaintiff from filing another Darkhast and seeking to bring it within limitation on grounds which were not before the Court when the previous Darkhast was filed The doctrine of *res judicata* cannot be extended to that length. [P. 239, C. 1]

H. B. Gumaste—for Applicant.

S. D. Sapre—for Opponent.

Macleod, C. J. :—The petitioner obtained a decree in Suit No. 91 of 1913 in the Court of the Second Class Subordinate Judge at Bagalkot against the opponent on the 2nd August, 1913, and filed an application for execution on the 3rd July, 1915. The application was struck off as notices were not served on the opponent A second application for execution No. 166 of 1919 was made on 25th June, 1919 but it was rejected as time-barred. The decree-holder again applied for execution on the 19th June, 1920 relying on an acknowledgment made on the 19th June, 1917 and signed by the opponent in a compromise application in a partition suit between himself and his brother. The learned Subordinate Judge said:—

"Darkhast was held to be time-barred in a previous application. The point is thus *res judicata*. The present application must, therefore, be rejected." He decid-

ed, therefore, that once a Darkhast had been rejected as time-barred no further Darkhast could be filed. That is not in agreement with the decision in *Mahadev* v. *Trimbakbhat* (1).

All that was decided in the previous Darkhast of 1919 was that the Darkhast itself was not in time. That would not prevent the executing plaintiff from filing another Darkhast and seeking to bring it within limitation on grounds which were not before the Court when the previous Darkhast was filed. The only ground on which this Darkhast could be rejected would be that the petitioner ought to have relied upon the acknowledgment of June, 1917, when he filed the previous Darkhast, and not having done so he is for ever barred from relying upon it. It does not seem to me that the doctrine of *res judicata* can be extended to this length.

I agree with what was said by my brother Shah in the case of *Mahadev* v. *Trimbakbhat* (1) which was cited, that in the earlier Darkhast there was no adjudication that the execution of the decree was barred but only that the application was not shown to be in time.

I think, therefore, that the rule must be made absolute and that the Darkhast must be returned to the lower Court to be dealt with on the merits.

Costs to be costs in the Darkhast.

Shah, J.:—I agree.

Rule made absolute.

(1) (1918) 21 Bom. L. R. 344=50 I, C. 972.

A. I. R. 1922 Bombay 239 (1).

MACLEOD, C. J. AND COYAJEE, J.

Emperor—Prosecutor

v.

Laxman Nath—Respondent.

Cr. Ref. No. 61 of 1921, decided on 12th January, 1922, from reference made by Dt. Magistrate, Sholapur.

Criminal P. C. (1898), S. 344—Police—Prosecution—Costs of adjournment — Complainant should not be saddled with.

If an adjournment of a case takes place for which the complainant is solely to blame, an order can be made that he must pay any costs which may have been incurred by the accused. But in a case of prosecution by the Police the complainant cannot be saddled with the costs incurred by the accused, at the time of granting an adjournment.

Macleod, C. J.:—This is a reference by the District Magistrate of Sholapur asking the High Court to exercise the powers conferred by Section 439 of the Criminal Procedure Code with regard to an order of costs under Section 344, Criminal Procedure Code, passed by the Second Class Magistrate of Malsiras. That order was that the expenses incurred by the 10th accused in bringing a pleader from Pandharpur, a distance of thirty-two miles and going back the same distance and also his pleader's fees which had been settled by the parties should be paid by the complainant.

Now I could understand that if an adjournment takes place for which the complainant is solely to blame, then an order could be made that the complainant should pay any costs which may have been incurred by the accused. But in this case, as the District Magistrate points out, the complainant was not at fault as the Magistrate had taken cognizance of the offence upon police report. The Police Sub-Inspector was responsible for keeping the witnesses in question present on the date fixed, and not the complainant who was only a witness.

We agree with the reasons given by the District Magistrate for setting aside the order passed by the Second Class Magistrate, and accordingly the order is set aside. if the amount has been paid it must be refunded.

Order set aside.

* A. I. R. 1922 Bombay 239 (2).

MACLEOD, C. J. AND SHAH, J.

Sitabai Nages Desai—Plaintiff-Appellant

v.

Parvatibai Nagesh Desai— Defendant-Respondent.

S. A. No. 519 of 1921, decided on 3rd April, 1922, from a decision of Asst. J., Belgaum in A. No. 236 of 1920.

* *Hindu Law — Adoption — Daughter's husband can be adopted.*

Under Hindu Law, the adoption of daughter's husband is valid.

A. G. Desai and *D. R. Manerikar*—for Appellant.

G. S. Rao—for Respondent.

Macleod, C. J.:—The main question which has been argued in this appeal is

whether the adoption by the first defendant of her daughter's husband was valid. The question arose in second Appeal No. 911 of 1915 in a case amongst Sudras and although there is no judgment, the appellate Court confirmed the decision of the lower Court that the adoption was valid. No authority has been cited for the proposition that in Hindu law there is a direct prohibition against the adoption of the daughter's husband. We are asked to hold that it is invalid on the ground that by the adoption the husband in effect becomes the brother of his wife, and, therefore, we should ourselves lay down that according to the rules of Hindu law the adoption of a daughter's husband is invalid.

For myself, I should say in the absence of a prohibition it would be difficult to hold that such an adoption, however undesirable it may be in ordinary circumstances, is invalid. In this case the widow appears to have been endeavouring to carry out as far as possible the wishes of her husband, who had expressed a desire that the sons of one of his daughters should be adopted. However both the sons of the second respondent died, and therefore no daughter's son was available for adoption.

It was also argued that there was an implied prohibition against the adoption of any one other than a daughter's son, but all that the evidence shows is that it was the desire of the husband that a daughter's son should be adopted, and it cannot be inferred that if a daughter's son was not available the husband prohibited the adoption of any one else. The appeal is dismissed with costs.

Shah, J.:—I agree.

Appeal dismissed.

A.I.R. 1922 Bombay 240

MARTEN AND CRUMP, JJ.

In re Maruti Bapuji Sonar.

Cr. Ref. No.25 of 1922, decided on 10th May, 1922, from the Dt. Magistrate, Nasik.

Bombay District Police Act (1890), Ss. 57 and 58 (2)—Finder of property—No claim by anybody—Finder is entitled to it.

Property not claimed by anybody after a proclamation is issued under Section 58 (2) should be made over to the finder. [P. 240, C. 2]

No appearance on either side.

Marten, J.:—This is a somewhat curious case. A boy found some property, and very properly handed it over to the Police for enquiries to be made. The Magistrate thereupon under the Bombay District Police Act, IV of 1890 issued a proclamation for the true owner. No such owner has come forward, and eventually the Magistrate sold the property, and has made an order vesting the sale proceeds of the property in Government.

It does not seem at first sight clear why the Government should get the property and why the boy who found the property and who *prima facie* is entitled to it in the absence of the true owner, should be deprived of it.

On investigation we find that this very point has been decided in this High Court by Mr. Justice Russal and Mr. Justice Chandavarkar in 1911 where almost precisely a similar case arose from Ahmedabad. There a similar course had been taken by the Magistrate, but that decision was set aside by the High Court and the property was ordered to be restored to the finder. Moreover the papers afterwards went before Government and were subsequently printed and circulated for general information amongst the Magistrates and other judicial officers in the mofussil.

That precedent we propose to follow in the present case. When this matter came before this High Court originally there was no such reference by the District Magistrate as we have now got. So now, as regards mere procedure we are in the same position as in the Ahmedabad case.

Accordingly the order made by the learned Magistrate will be set aside, and the property or rather the sale proceeds will be ordered to be restored to the original finder.

I may add that I doubt whether the learned Magistrate had any jurisdiction to sell these goods without the consent of the finder ; but our order can only deal with the property now before us, *viz.*, the proceeds of sale.

Crump, J.:—I agree.

Order set aside.

A. I. R. 1922 Bombay 241.

MACLEOD, C. J. AND COYAJEE, J.

Chunilal Devaji—Plaintiff-Appellant.

v.

Karamchand Shrichand—Deft. 1-Respondent.

S. A. No. 237 of 1921 decided on 19th January 1922 from a decision of joint Judge, Thana, A. Nos. 177 and 178 of 1919.

C.P. C., S. 64—Alienation after attachment by one creditor—Invalidity—Subsequent attaching creditors can also take advantage of—"All claims enforceable under the attachment"—Meaning of.

Subsequent claims for rateable distribution must be considered as claims enforceable under the original attachment under the explanations to S. 64. When an attachment has been levied on property in execution of a decree then any attempt by the judgment-debtor to deal thereafter with the property, must be considered as contrary to the attachment and the transferee or mortgagee must be considered as taking the transfer or mortgage subject to all claims which would be made against the property attached which by the law are not confined to claims of creditors attaching before the transfer but will also include the claims of any other execution creditors who may apply for execution before the assets are realised.

[P. 242, C. 2.]

G. N. Thakor—for Appellant.

G. S. Rao for *P. B. Shingne* and *B. R. Damle*—for Respondent.

Macleod, C. J.—The facts of this suit are somewhat complicated and have been rendered more complicated by the fact that in the course of the proceedings an order was passed allowing the plaintiffs to amend their plaint. But in this second appeal the only respondent is the 1st defendant and we are not concerned with any order passed by the lower Appellate Court against the remaining defendants.

The lower Appellate Court dismissed the suit as against the first defendant, reversing the decree of the trial Court, which directed that the plaintiffs should recover from the 1st defendant Rs. 1,074-3-7 with interest. It is against the order of the lower Appellate Court dismissing the suit as against the 1st defendant that the plaintiffs appeal and for the purposes of the appeal it will only be necessary to refer to certain main facts.

In 1904 one Amarchand Keshavji filed a suit against certain persons, who are represented now in this suit by defendants 2 to 10. He attached certain properties before judgment which may be referred to as properties A and properties B.

In 1905 the present defendant No. 1 Karamchand filed a suit against the same parties and obtained a decree in 1906.

Now properties A had been mortgaged to plaintiffs in 1902 before the attachment levied by Amarchand, but properties B were mortgaged to the plaintiffs in 1905, after Amarchand's attachment, but before Karamchand obtained his decree.

Amarchand sought to execute his decree by sale of the properties A and B and it was ordered that properties A should be sold subject to plaintiffs' mortgage of 1902, while properties B were to be sold free of the mortgage of 1905. Four lands out of B were sold. Meanwhile Karamchand had applied for execution of his decree with the result that the sale proceeds of the four lands out of B namely: Rs. 3,265, were distributed rateably under Section 73 of the Civil Procedure Code between Amarchand and the 1st defendant Karamchand. It is that sum of Rs. 1,[illegible]00 which was paid to Karamchand under Section 73 which the plaintiffs now seek to recover.

A very similar question arose in *Sorabji Edulji Warden* v. *Govind Ramji* (1) which was decided by Mr. Justice Telang. That was a case under the Civil Procedure Code of 1882. The plaintiff Warden had filed a suit against Govind Ramji for Rs. 2,237 on the 8th July 1890, and obtained an attachment before judgment of certain money belonging to Govind Ramji in the hands of the B. B. and C. I. Railway Company. On the 5th August 1890, Warden got a decree and on the 13th August he applied for execution.

On the 24th September Govind Ramji made an assignment in favour of his attorneys, Messrs. Wadia and Ghandy, of the fund belonging to him (expressed to be Rs. 7,818) in the hands of the Railway Company, subject to the attachment levied by Warden. In February 1891, the Bank of Bengal attached the sum of Rs. 7,818 in the hands of the Railway Company, in execution of a decree, obtained by the Bank against Govind Ramji in Suit No. 190 of 1890 and subsequently other creditors of Govind Ramji, who had obtained judgment against him applied for execution and obtained attachments.

(1) (1891) 16 Bom. 91.

On the 26th May 1891, under a consent order in Suit No. 382 of 1890 (that was Warden's suit) the Railway Company paid over to the Sheriff of Bombay, the sum of Rs. 8,084-1-0 which was the amount admitted by the Company to be due to Govind Ramji after making all just deductions.

It was contended by Messrs. Wadia and Ghandy that under the above assignment of the 24th September 1890, they were entitled to the fund assigned to them, subject only to the claim of Warden who had, at the date of assignment, already attached the said fund, and that subsequent attaching creditors had no claim to the said fund.

It was held that the fund in question should be regarded as assets realized by sale, or otherwise, in execution of the decree within the meaning of Section 295 of the Code of Civil Procedure of 1882.

It was also held that under the provisions of Section 295 the claims of the subsequent execution creditors were "claims enforceable under the attachment" of Warden within the meaning of Section 276 of the Civil Procedure Code and that the assignment to Messrs. Wadia and Ghandy was void, as well against the claims of the creditors of Govind Ramji, who applied for execution before the 26th May 1891 as against the claim of Warden to the funds in the hands of the Sheriff of Bombay.

It was also held that the attachment was not limited merely to such portion of the fund as covered the amount of Warden's decree, but was a valid attachment in the form in which it was made namely on the whole fund in the hands of the Railway Company.

Section 64 of the Code of 1908 is the section corresponding to Section 276 and the explanation to the section, which is new, gives the sanction of the Legislature to the view of Mr. Justice Telang, which otherwise might have been open to correction by a higher Court.

Now it seems to me that substituting "properties B" for "the funds" in that case in the hands of the Railway Company, which were due to the judgment-debtor there can be no difference in the principle applicable to both cases. The mortgage by defendant No. 2 of properties B after Amarchand's attachment was undoubtedly contrary to the attachment, which could not be limited to only such portion of the properties as might be sufficient to cover the amount of the decree, but was an attachment against the whole of the property. Mr. Justice Telang held that the attachment in Warden's case was not limited to so much of the fund as would be sufficient to cover his decree but was a valid attachment against the whole fund which was over Rs. 7,000. As long as the assets are not realized it is open to any other subsequent judgment-creditor to apply for execution of his decree against the property attached by the previous judgment-creditor before any private transfer or delivery of property to third parties has been made.

The argument in *Warden's case* chiefly dealt with the question whether subsequent claims which might be made for rateable distribution could be considered as claims enforceable under the original attachment, and that point has now been made clear by the explanation to Section 64 and it is difficult to see now what is left for the appellants to argue in the face of the decision, unless it could be said that the property attached by the judgment-creditor is property to which different principles must apply than to property which consisted of a fund claimable by the judgment-debtor in the hands of a third party. When an attachment has been levied on property in execution of a decree, then any attempt by the judgment-debtor to deal thereafter with the property must be considered as contrary to the attachment and the transferee or mortgagee must be considered as taking the transfer or mortgage subject to all claims which could be made against the property attached, which by the law are not confined to claims of creditors attaching before the transfer, but will also include the claims of any other execution creditors who may apply for execution before the assets are realized. We think the decision of the Court below was right and the appeal should be dismissed with costs.

Coyajee, J.—I agree with the reasons given in the judgment now delivered by the learned Chief Justice. It is contended on behalf of the appellants in this second appeal that although the mortgage executed in their favour in the year 1905 by the predecessors-in-interest of defendants Nos.

2 to 10 was void as against Amarchand's claims, it was not necessarily void as against the claims of Karamchand. In support of this contention it is urged that but for the attachment and sale effected on the application of Amarchand what Karamchand could have brought to sale in execution of his own decree would have been the right, title and interest of the original mortgagors in the property, subject to the prior incumbrances created by them and that the rights of the mortgagees would have remained unaffected by such sale. That no doubt is the true effect of a judicial sale. But here the property was brought to sale under an attachment made at the instance of Amarchand; and Karamchand was clearly entitled to the benefit of Section 73, Civil Procedure Code, 1908, which with certain alterations not here material—replaces Section 295 of the Code of 1882, and which enabled him to claim a share by rateable division in the assets realized by such sale. As against Amarchand's claims the mortgage in favour of the plaintiffs was void, and the property secured by the mortgage was liable to be sold free from the mortgage (Section 64, Civil Procedure Code, 1908 which corresponds to Section 276 of the Code of 1882). If then it was void as against Amarchand's claims it was also void as against all claims enforceable under the attachment made at his instance. For, even under the provisions of the Code of 1882, the claims of the subsequent execution-creditor Karamchand were "claims enforceable under the attachment" made in enforcement of Amarchand's decree: *Sorabji Edulji Warden* v *Govind Ramji* (1). The explanation to the 64th section of the Code of 1908 gives effect to that decision and expressly says that "claims enforceable under an attachment include claims for the rateable distribution of assets."

It would thus appear that the mortgage in question is void against Karamchand's claims also. The plaintiffs entered into the transaction subsequent to and in defiance of Amarchand's attachment and they presumably knew the legal consequences of that attachment.

Appeal dismissed.

A. I. R. 1922 Bombay 243.

MACLEOD, C. J., AND COYAJEE, J.

Mahamedsaheb Ibrahimsaheb—Defendant-Appellant. v.

Tilokchand Abhechand Marwadi—Plaintiff-Respondent.

S. A. No. 26 of 1921, decided on 31st January 1922 from a decision of Asst. J., Sholapur, in A. No. 145 of 1917.

Limitation Act (1908), *Arts.* 142, 144—*Suit in ejectment—Dispossession within twelve years—Possession of open sites—Possession will presumably follow possession of property to which they adjoin.*

The plaintiff, who purchased at a Court sale a shop and two open pieces of land in front of it and was placed in possession, sued to eject from the land the defendant who claimed to be a subsequent purchaser from the judgment-debtor;

Held: If the plaintiff established his title over the property he can rely upon the presumption that possession went with the title in absence of satisfactory evidence in rebuttal. As under Article 142 time begins to run from the date of the dispossession; if the plaintiff alleges his dispossession within twelve years of the suit, then the question must arise according to the circumstances of each case how far the plaintiff has correctly fixed the date of dispossession and how far the onus lies on the defendant to show that that date was wrong. In a suit for ejectment it is for the plaintiff to prove possession prior to the dispossession which he alleges. On the question of evidence however, the initial fact of the plaintiff's title comes to his aid. Possession of open sites goes naturally with the possession of the property to which they adjoin. If the defendant asserts his rights, he must show, that he has been in possession adversely against the owner of the property. [P. 244, C. 1.]

Gokhale and *V. V. Bhadkamkar*—for Appellant.

P. B. Shingne—for Respondent No. 1.

Judgment:—The plaintiff filed this suit to recover possession of the two open sites described in the plaint. He alleged dispossession by the defendant unlawfully about three years prior to the suit. The defendant alleged that the plaintiff was not the owner of the plaint property; that he had never been in possession or enjoyment of it; that the defendant had been in possession for many years as owner; that the suit was time barred; and that the cause of action did not accrue in 1913. The main issues were: (1) Does the plaintiff prove that the plots in suit were purchased by him at the auction sale in 1893; and (2) Is it proved that the plaintiff was in possession within twelve years before the suit? The first issue was found by the trial Court in the affirmative, the second, in the

negative. The result was that the suit was dismissed.

In appeal the learned Judge was of opinion that the evidence of the witnesses on both sides was unworthy of credit. But the plaintiff having established his title over the plaint property he could rely upon the presumption that possession goes with the title. There being no satisfactory evidence in rebuttal the presumption must be given effect to.

This raises a question which has often been discussed in these Courts, and eventually it may have to come up for decision before a Full Bench. No doubt if the suit comes under Article 142 of the First Schedule of the Indian Limitation Act time begins to run from the date of the dispossession. But if the plaintiff alleges he is dispossessed within twelve years of the suit, then the question must arise, according to the circumstances of each case, how far the plaintiff has correctly fixed the date of dispossession, and how far the onus lies on the defendant to show that that date was wrong. I may refer to *Secretary of State for India* v. *Chelikani Rama Rao* (1) and *Kuthali Moothuvar* v. *Peringati Kunharan Kutty*, (2) where their Lordships said on the question of the *onus probandi* in cases where title has been proved :—

" Standing a title in " A " the alleged adverse possession of ' B ' must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor."

We take it that the general principle is, as laid down by the Privy Council in *Rami Hemanta* v. *Maharaja Jagadindra* (3) that it is for the plaintiff in a suit for ejectment to prove possession prior to the dispossession which he alleges. At the same time, on this question of evidence the initial fact of the plaintiff's title comes to his aid, with greater or less force according to the circumstances established in evidence. If it is proved that the plaintiff has title and obtained possession under that title, then the general presumption of law is that possession goes with the title.

In *Ganpathi* v. *Raghunath* (4) the plaintiff sued to have it declared that the land described in the plaint belonged to him and to recover damages from the defendant for wrongfully taking possession of it, and for possession. The learned Chief Justice at p. 717, after referring to the evidence with regard to possession, which had been found to be unsatisfactory, said :

" Upon that finding as to the present state of facts and having regard to the statement of the defendant's father to which we have already referred, we have to consider whom the possession of the vacant land must be presumed to have been with, in absence of direct evidence. Now it is held in the case that the title to this land was in the plaintiff, and it is held that the defendant has made no permanent use of it inconsistent with its being the plaintiff's land. That being so, a case is made out for the application of the presumption stated by their Lordships of the Privy Council in *Runjeet Ram Pandey* v. *Gaburdhun Ram Pandhay* (5) that possession goes with title. No contrary presumption adverse to the plaintiff can, we think, arise from the wrongful acts of the defendant's father in 1880, which were promptly repudiated by him when he was charged in the Magistrate's Court."

Now a reference to the Map in this case would show that the plaint sites lie adjacent to and appurtenant to the shop which was purchased by the plaintiff together with the sites and it certainly would not be necessary for him to preserve evidence that ever since the date of his purchase he was in active possession of those open sites. Possession of those sites would naturally go with the possession of the shop, and when the defendant asserted his right over the open sites he would have to show in the absence of any evidence that these sites ceased to be appurtenant to the shop, and that he had been in possession adversely against the owner of the shop. Therefore this is one of those cases in which the fact of the plaintiff's title comes to his aid with greater force as far as the evidence goes

(1) A.I.R. 1916 P.C. 21=39 Mad. 617=43 I. A. 192 (P. C.)
(2) A. I. R. 1922 P. C. 181=48 I. A. 395 (P. C.)
(3) (1906) 33 Cal. 23=10 C. W. N. 680=16 M. L. J. 272 (P. C.)
(4) (1909) 33 Bom. 712=4 I. C. 244=11 Bom. L. R. 1087.
(5) (1873) 20 W. R. 25 (P. C.).

with regard to the possession of the open sites; and eliminating all the oral evidence on both sides as being unsatisfactory, (and naturally, considering the position of these open sites, and the difficulty of proving active user, it would be unsatisfactory, we think the learned Assistant Judge was perfectly right in holding that possession went with the title. Therefore, unless the defendant could show that he had been in possession adversely to the plaintiff for more than twelve years, the plaintiff would be entitled to a decree. The decree of the lower Appellate Court is varied by eliminating the direction as to past mesne profits. In other respects the decree is confirmed and the appeal dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 245.

MACLEOD, C. J. AND COYAJEE, J.

Shama Durgaji Bhoi—Defendant-Appellant.

v.

Gangadhar Narayan Muzumdar—Plaintiff-Respondent.

S. A. No. 112 of 1921, decided on 7th February 1922 from a decision of joint Judge, Poona, in A. No. 129 of 1920.

Ferry—Acquisition of right—Can only be by grant express or implied and not by prescription.

The right to a ferry franchise between two villages cannot be acquired by mere prescription but there must be facts proved from which, if there is no direct grant from the Government, it can be implied that such grant was actually made. [P. 245, C. 2; P. 246, C 1.]

D. A. Tuljapurkar—for Appellant.

Mehendale and *P. B. Shingne*—for Respondent.

Judgment:—The plaintiffs sued for a declaration that they alone had a right to ply a ferry between the village of Bhopkhel and Kirkee Bazaar, and for an injunction restraining the defendant from plying a ferry between the Bhopkhel and Kirkee Bazaar. The river Mula runs between these two villages and until a dam was built in 1872 people were able to cross the river except in the rainy season. That has no longer been possible since the building of the dam. The plaintiffs who are *Inamdars* of the village of Bhopkhel then began to run a ferry to take people across and they were receiving the income from the ferry until 1915 when the first defendant began to run a rival ferry under the permission granted by the Superintendent of the Ammunition Factory, ratified by the Collector.

When the plaintiffs objected to the first defendant's plying his ferry an order was passed by the Collector as follows:—

"In this Office No. L. F. 1/853-3 of 25th March 1916 Shama Durgaji Bhoi of Kirkee was informed that the Collector has no objection to Shama plying his ferry between Kirkee and Kalas. The Collector now understands from an application from the Inamdar of Bhopkhel that Shama is working his ferry boat between Kirkee and Bhopkhel. Shama is therefore informed that he is not entitled to run a ferry between Kirkee and Bhopkhel without the permission of the Inamdar of Bhopkhel."

Exhibit 22 is the application of the first defendant to the Collector from which it would appear that the limits within which he wished to ply his boat were not definitely stated. The applicant said:

"There is a dam of the river Mula within the limit of the Superintendent of the Ammunition Factory at Kirkee and he has sanctioned the plying of a boat to convey workmen in the factory. Therefore, I have bought a boat worth Rs. 400. Within the said limit I have been plying a boat for these four or five months. Hence I have given a written statement in the office of the Mamlatdar, Haveli, Poona. Your honour should allow me to ply a boat in the aforesaid limit."

So although the Collector might have sanctioned the plying of a boat by the first defendant during the limits of the waters held up by the dam when the *Inamdar* of Bhopkhel objected to the first defendant running a ferry between his village and Kirkee the first defendant was told he could not do that without the permission of the *Inamdar*.

Both Courts have decreed the plaintiffs' claim and the question is whether the plaintiffs have established a right to a ferry franchise between these two villages so that they are entitled to come to Court to ask the Court to restrain the defendant or any one else from infringing that right. It may be conceded that such a franchise cannot be acquired by mere prescription and that there must be facts

proved from which, if there is no direct grant from the Government it could be implied that such grant was actually made. It is not disputed that Government have the right to grant such a franchise; and we have to consider the evidence in this case and see whether, since no direct grant has been produced, the Courts were entitled to infer that such a grant was actually made. When the dam was built it was obvious that some provision would have to be made for conveying the public from one side of the bank of the river to the other, and that the Government recognized the rights of the Inamdars to a portion of the bed of the river can be seen from the fact that they granted compensation to the Inamdar for the loss which he incurred owing to his no longer being able to derive revenue from the melon grounds in the bed of the river. Government were evidently aware that the Inamdars had started plying a ferry between their village and the Kirkee side of the river bank.

Then an order was passed on 28th July 1879 by the Collector which unfortunately is not forthcoming but the Mamlatdar gave information regarding this order to the Inamdars by Exhibit 71; "Yadi (memorandum) written to the Inamdar of Bhopkhel, Taluka Haveli from Mamlatdar, Taluka Haveli to the effect that you ply a private boat in the river within the limits of the said Mauje and the revenue received was shown in the record. Proceeding in respect thereof went on and at last the order Inward No. 1072, dated 20th July 1879 was received from the Collector, On its strength it is informed that you ply a boat in the river of private ownership for the convenience of people. It should be understood that it is being plied with the permission of the Government." We think that there is sufficient evidence to presume that the Government had granted the franchise to the Inamdars. In addition we have this fact that the Inamdars have been plying this ferry ever since 1879 and it has never been suggested that any one could ply a ferry in competition with them.

In *Nityahari Roy* v. *Dunne* (1) which was a suit brought to establish a right to a ferry franchise and to restrain the working of a rival ferry the law on the question is fully considered and at p. 657 the learned Judges said:—

"There is no dispute that the Government is in a position, if it likes, to create a franchise. We think that both the documents and the village register prepared in 1861 by the proper authorities are admissible to show that in the year 1859 the plaintiffs made a claim to the franchise, and, on a proper inquiry made by Government, that claim was admitted. The next acknowledgment made by the Crown of the existence of this ferry is to be found on the face of the *Thakbast* maps to Deogram and Mohespur. In effect it amounts to this, that a summary inquiry, No. 305, having been instituted, it was found that this Ghat was appurtenant to the villages of Deogram and Mohespur belonging to Khalilabad, and an endorsement was made on the map to this effect under the orders of the Government. We thus see that at two distinct and separate times within the last thirty years, namely in 1861, and in 1876, the Crown has admitted the right of the plaintiffs to hold a ferry, on the basis that it has been permanently settled with them in the same manner as their estate We are therefore, of opinion that the Subordinate Judge was right in holding that the plaintiffs have, from time immemorial, had a franchise granted to them by the Crown which enabled them to claim monopoly of the right to ferry within reasonable limits across the river. The grant itself has not been produced and Pearapur-Aglapur is at some distance from Deogram. But still in 1859, in 1861, and again in 1876, the monopoly was found by the proper Government Officers, to be appurtenant to two villages, namely, Deogram and Mohespur, within the Pergunnah of Khalilabad. There is still another matter for consideration. It is a general principle that ancient grants may be explained by modern user. In this case the user spoken to by the witnesses, which undoubtedly existed, was in the immediate vicinity, if not from the boundary between those villages as is found by the Subordinate Judge and must be taken to be a user supported by the right by which it was claimed. Consequently, although we think that the plaintiffs have established a right of ferry appurtenant to

(1) (1891) 18 Cal. 652.

Deogram and Mohespur on the left bank of the river, they have not been able to establish anything more; and we agree with the learned Subordinate Judge that their claim so far as it asserts that right to establish a ferry beyond the purview of those villages, must be rejected."

It must be admitted in this case that there was no reason to grant a ferry franchise before the dam was built, and so it is not possible to presume a grant from immemorial user. But such a grant can still be presumed from the evidence in the case. We think, therefore, the Courts below were right in holding that the facts in this case raise a presumption that there was a Government grant in favour of the plaintiffs. The appeal, therefore, fails and must be dismissed with costs.

—— *Appeal dismissed.*

A. I. R. 1922 Bombay 247

FULL BENCH

MACLEOD, C. J., SHAH AND FAWCETT, JJ.

Mulji Tribhovan Sevak—Plaintiff-Appellant.

v.

Dakor Municipality—Defendant-Respondent.

S. A. No. 170 of 1921, decided on 18th November 1921 from a decision of Asst. J., Ahmedabad, in A. No. 345 of 1918.

(a) *Bombay District Municipal Act* (1901), *Ss. 36* (2), *96—New buildings—Permission granted by P. W. Committee—General Body can revoke the permission.*

The order permitting to build a new house made by the Public Works Committee of the Defendant Municipality under S. 96 could be cancelled or revoked by the General Body either of its own motion or on the application of a person injuriously affected thereby, subject to the qualification that the cancellation or revocation was otherwise consistent with the provisions of S. 96. [P. 249, C. 1, 2.]

(b) *Interpretation of Statutes—General and Special Provisions—Special Provision prevails.*

Per *Fawcett, J.*:—Wherever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former; the particular enactment must be operative and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply. The general principle is that due effect should be given to every part of a statute.

[P. 251; C. 2, and P. 251, C. 2.]

G. N. Thakor—for Appellant.

H. V. Divatia—for Respondent.

ORDER OF REFERENCE.

Macleod, C. J.—On the 12th March 1917, the plaintiff made an application to the Municipality of Dakor for permission to build an upper storey over the portion of his Khadki which admittedly belonged to him. The Public Works Committee granted the permission asked for, by its Resolution No. 2, dated 22nd March 1917 and the same was duly communicated to him, plaintiff had also asked for permission to build *otlas* at the southern end of the Khadki on both the sides. The permission for *otlas* was also granted. On the same day one Chunilal Amirtlal made an application to the Vice-President of the Municipality stating that the light and air coming through the eastern wall of his house would be obstructed by plaintiff's building an upper storey over the Khadki. He also alleged that in case of fire taking place in plaintiff's Khadki, the fire would extend to the other Khadki. That application was put before the General Board of the Municipality and the Board directed the plaintiff, on 5th April 1917, not to commence any work according to the permission granted by the Public Works Committee. No work had been commenced by the plaintiff then. The General Board also, on the same day, asked the Public Works Committee to reconsider the matter in view of Chunilal's application. On the 7th May 1917 the Public Works Committee reported to the General Board that on seeing the place it appeared that light and air would be diminished by plaintiff's building an upper storey, and that it would cause inconvenience, to the people in times of fire. The Committee, therefore, recommended that plaintiff should not be allowed to build an upper storey over the Khadki. On 7th May 1917, the General Board adopted the recommendations made by the Committee and cancelled the permission granted to the plaintiff and directed him not to build the upper storey. Plaintiff accordingly filed this suit after giving notice to the Municipality asking for a declaration that he was entitled to build the upper storey according to the permission granted to him by the Public Works Committee and alleging that the permission granted by the Managing Committee could not be subsequently revoked by the General Board and that the order of the General Board was illegal.

The suit was decreed by the trial Court; in appeal that decision was reversed and the suit was dismissed. The question at issue in this appeal to my mind admits neither of doubt nor of difficulty. The material sections of the Bombay District Municipal Act (III of 1901) are as follows: S. 29—The Municipality may appoint, for a period not exceeding one year, any

such committee or such or so many committees consisting of such councillors as they think fit for any purpose or respectively for any of the purposes, other than those specified in Section 28, for which a managing committee may,under Section 27, exercise the powers of a Municipality, and may invest each committee so appointed with such of the said powers as may be necessary or expedient for the fulfilment of the purpose for which it is appointed. Section 36 (2) Every order passed by a managing committee or by a committee appointed under Section 28 or 29, other than orders under Sub-section (3) of Section 65, shall be subject to such revision, and open to such appeal, as may be required or allowed in respect thereof by any rules of the Municipality for the time being in force under Section 46. Section 46 (*a*) Every Municipality shall make rules regulating the conduct of their business and the delegation of any of their powers or duties and, subject to the provisions of Section 27, the appointment and constitution of committees.

Then the following rules of the defendant Municipality are relevant :—

Rule 42, Every delegation of the Municipality executive functions, power or duties shall be deemed to be made subject to the general control of the Municipality and in particular to the provisions of rules 43 to 55. Rule 49. It shall be the duty of the President to watch over delegates (whether commitees or individuals) and to bring to their notice and, if necessary, to the notice of the Municipality any instances in which they seem to have erred in the exercise of their functions as delegates, or to be negligent or dilatory about exercising the same. Rule 54. Except as otherwise expressly provided in the Act or in the rules under the Act no act of any delegate shall be revised or called in question otherwise than (*i*) as provided in rules 49, 50 and 55, or (*ii*) by a resolution supported by at least half the total number of councillors at a special general meeting called for this purpose. Rule 55. First appeals against the decisions or orders of delegates other than the orders of a committee under Section 65 (3) shall lie to the Municipality.

Rule 58 (1). Any appeal may be rejected, by the authority to which it lies, if received more than 30 days after the date of delivery of the order appealed against to the party effected orally or in writing.

Clearly, therefore, the order of the Public Works Committee is appealable. The only question is whether the appeal by Chunilal Amritlal, a neighbour, should be entertained. It seems to me, that, according to the ordinary principles of justice, any person injuriously affected by an order of the Public Works Committee would be entitled to appeal to the General Board of the Municipality against the order. Otherwise the only person who could appeal would be the person who had applied for permission to the Committee and he would only appeal if his application was refused.

It is argued that when the Public Works Committee granted permission they were making the order under Section 96 of the Act and that it should be treated as an order of the Municipality Act which plaintiff was not entitled to get set aside. No doubt to this extent it is an order of the Municipality that any action in compliance with the permission would be lawful. But if the order was only granted by the Public Works Committee it would still be, open for consideration whether the Committee had properly exercised the powers delegated to it by the Municipality, and the rules make it clear that the order of the Public Works Committee is open to appeal and subject to revision. The only difficulty which arises to my mind in the case is the decisions of this Court to which references have been made, namely, *Emperor* v. *Kareem Ranjan*: (1), *Vithal* v. *Alibag Municipality* (2) and *Abdul Wahab* v. *Solapur Municipality* (3). In none of these cases was Section 36 of Act III of 1901 mentioned. As far as I can see the principle laid down in these decisions was that once the Municipality had come to a decision and passed an order, the Municipality could not cancel or revoke that order. However it would appear from the record in S. A. 180 of 1917 that the first order was made by the Managing Committee and not by the Municipality. It is, desirable, therefore,

(1) (1916) 19 Bom. L. R. 65=39 I.C. 298
(2) (1918) 42 Bom. 629=47 I. C. 145=20 Bom. L. R. 756.
(3) A.I.R. 1921 Bom. 489=45 Bom. 797.

that this question should be settled by a Full Bench and the question to be referred is :—

Whether the order made by the Public Works Committee of the defendant Municipality under Section 96 of Act III of 1901 could be cancelled or revoked by the General Body either of its own motion or on the application of a person injuriously affected thereby.

Shah, J.—I agree that the question formulated by my Lord the Chief Justice should be referred to a Full Bench.

With regard to the power of the Municipality to revoke the permission once granted under Section 96 of the Bombay District Municipal Act, I think it fair to state that so far as I remember at present neither the provisions of Section 36 (2) of the Act nor the rules relating to revision and appeal were referred to in the course of the arguments in any of the decisions in *Emperor* v. *Kareem Ranjan* (1) *Vithal* v. *Alibag Municipality* (2) and *Sholapur Municipality* v. *Abdul Wahab* (3) to which I was a party. But whether they were referred to or not, there is no reference to them in the judgments. In all these cases the permission to build was granted by the Managing Committee.

I feel a difficulty in accepting the contention of the respondent that the principle underlying these decisions is wrong and the difficulty arises in consequence of the provisions and scheme of Section 96 of the Bombay District Municipal Act. I do not desire to say anything more on this point as it will be considered by the Full Bench. The reasons for the view taken in those decisions are stated therein.

It is no doubt true that under Section 36 (2) read with the rules which are framed by the Municipality in this particular case, the order passed by the Committee would appear to be open to appeal and liable to be cancelled by the General Body. But the point that presents a difficulty to my mind is whether the general provisions and rules as to revision and appeal allow an appeal by any person to the Municipality against the order of the Committee granting the permission to build. If the notice to build under Section 96 is treated as a matter between the Municipality and the owner, the Municipality either as a body or through its committee may grant or refuse the permission. If a Committee refuses the permission, the owner may appeal to the General Body but if the permission is granted there would be an end of that matter so far as the Municipality is concerned. If these rules relating to revision and appeal for the internal management of the Municipality are interpreted so liberally as to allow appeals by anybody to the General Body against an order, which is of such importance to the person who wants to build, it would introduce an element of uncertainty and hardship not contemplated by Section 96. This is an aspect of the question which requires to be considered ; and I am by no means clear that an order granting permission to build under Section 96 could be modified or cancelled subsequently by the Municipality either of its own accord or at the instance of a third party. It may be possible to distinguish the decisions above referred to. But as the interpretation of the provisions as to revision and appeal might conflict with the *ratio decidendi* of these cases it is desirable that the matter should be considered by a Full Bench.

The reference was heard by a Full Bench consisting of Macleod, C.J. and Shah and Fawcett, JJ.

Macleod, C. J.—I think the question referred to the Full Bench should be answered in the affirmative. There can be no doubt that a Municipality has appellate and revisional powers over orders passed by the Managing Committee, or by a Committee appointed under Section 28 or 29, other than orders under sub-section 3 of Section 65 which powers are to be exercised in accordance with the rules framed under Section 46. Whether those powers have been properly exercised is a question which must be decided in each case on its merits.

Shah, J.—I would answer the question referred to the Full Bench in the affirmative, subject to the qualification that the cancellation or revocation is otherwise consistent with the provisions of Section 96 of the Bombay District Municipal Act of 1901.

In the present case the power to deal with notice under Section 96 is delegated to

the Public Works Committee and the Delegation is subject to revision and appeal as provided by Section 36 (2) and the rules of the Dakor Municipality framed under Section 46 of that Act. So far as the General Board of the Municipality can exercise the power vested in them, consistently with the provisions of Section 96. undoubtedly that body may do so. It may be that owing to the lapse of time or anything that may have happened in consequence of the leave granted by the Committee or any other reason there may be difficulty in the way of exercising those powers effectively. But the Municipality have the legal right to exercise the powers of revision and appeal within the limits allowed by the statute and the rules thereunder.

Having regard to the terms of rule 58, which prescribes the period of limitation for appeal by the party affected to whom the order, complained of, has been delivered orally or in writing, I am not clear that in the present case an appeal by a person to whom no such order was communicated is provided or contemplated. But rule 55 provides for appeals against the decisions or orders of delegates generally and where a party is injuriously affected by an order even though it may not be communicated to him orally or in writing, it would be open to him to appeal to the Municipality. In the absence of any specific rule as to the parties who may appeal, it is not possible to say that the neighbour in the present case had no right to appeal. It is really for the Municipality to consider whether they will entertain an appeal from a third person, when an order is passed under Section 96 by any delegated authority. They would have to consider whether an appellant has sufficient interest in the order to make his appeal competent. This question is not of any practical importance as in any case the Municipality have the power to revise the order of their own accord. The difficulty may really arise in making a proper order so as to satisfy the requirements of Section 96 which does not in terms contemplate and provide for a second order under Sub-section (2). That, however, is a matter to be considered by the Municipality in the first instance while making an order in revision or appeal, and by the Court so far as necessary if the dispute arises between the Municipality and the party with reference to the facts of the case.

As regards the decisions of this Court which have been referred to in the referring judgments I think that on their own facts they are distinguishable from the present case; and in those cases, so far as I can see, the result could not have been different in spite of the provisions of Section 36 (2). However that may be, if and so far as they purport to lay down any General rule which conflicts with the statutory powers of the General Body of the Municipality to modify the orders of their delegates or any Committee, they cannot be followed.

While thus the Municipality had the power to modify the order of the Public Works Committee the question as to whether the cancellation is in accordance with the provisions of Section 96 must be considered with reference to the facts of the present case. The plaintiff gave notice under Section 96 on the 12th March to build an upper storey over the portion of his Khadki which belonged to him. The Public Works Committee of the Municipality granted him leave on the 22nd March under Section 96, Sub-section (2). His neighbour, Chunilal, made an application on the same day complaining of the permission granted by that Committee. The General Board made a provisional order on the 5th April restraining him from building. Ultimately the General Board cancelled the leave on the 7th May. The plaintiff had not commenced to build before this date or even before the 5th April. It is not necessary to consider whether the provisional order of the 5th April would be within the scope of Sub-section (3) of section 96. The orders contemplated by thatSub-section are those made before any order under Sub-section (2) is made. On the other hand it was made within a month of the application and in exercise of the revisional powers which the Municipality had under the rules. It is not necessary to decide this point as the plaintiff had not commenced to build before or after that date. The final order was made within two months of the date of the application. No doubt it is an order which cancels the permission granted; but it is not suggested on the facts of this case, and having regard to the nature of the proposed building and the objections to it can hardly be suggested that the order is not within the

powers of the Municipality under Section 96, Sub section (2). I do not say that it is open to the Municipality under Sub-section (2) to prevent all building by the owners on their respective lands nor do I desire to express any opinion as to whether the Municipality can properly take into consideration the disputes between neighbours as to easements in deciding whether the permission asked for should be granted or not. All that it is necessary to decide is whether the final order of the Municipality is open to any such objection as would necessitate the interference of the Court with the discretionary powers of the Municipality in a matter which is primarily committed to its care by the Legislature. I do not think that the refusal of the Municipality to let the plaintiff build, in this case, transgresses the limits of their discretion under the Act.

At the same time it is possible that in consequence of the lapse of time or the owner proceeding to act under the first order which he might be entitled to do if so minded, the revocation may not be effective. It seems to me that having regard to the scheme of the section the detailed provisions as to various matters connected with the newly proposed building and the element of uncertainty and hardship which conflicting orders purporting to be made under Sub-section (2) are apt to involve and the difficult questions which they are likely to give rise to, it is desirable that the position of the Municipality and the persons desirous of building may be defined by the Legislature so that the General Body exercising revisional or appellate powers and the persons who want to build may know definitely their respective positions after an order is made by a Committee or any other authority under Sub-section (2) which is subject to revision or appeal against the person proposing to build. The usual case in which the person proposing to build wants a modification of the order of the Committee presents no difficulty. But the difficulty might arise in cases where the General Board of the Municipality seeks to modify or cancel the order already made in his favour under Sub-section (2) of Section 96 apparently as no time limit is prescribed within which the General Board may pass orders under Section 96 (2) in appeal or revision against the person who has already got leave to build from the Committee.

Fawcett, J.—In my opinion the question referred to the Full Bench should be answered in the affirmative.

There is no doubt, and it has not been disputed, that the power of making orders under Section 96 of the Bombay District Municipal Act III of 1901 could be delegated by the Municipality to its Public Works Committee. That is a Committee appointed under Section. 29 of the Act, and it follows that the provisions of Sub-section (2) of Section 36 of the Act cover the order passed by the Public Works Committee on the 22nd March 1917, giving the appellant the permission he had applied for, unless there is such an inconsistency between this general enactment and the particular enactment regarding new buildings in Section 96 as would make it incumbent upon the Court to apply the ordinary rule of construction in such a case. That is "wherever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

This is the rule laid down by Ramilly, M. R. in *Pretty* v. *Solly* (4) the leading case on the subject.

It is contended by Mr. Thakur for the appellant that there is such an inconsistency. His contention is that, inasmuch as this power had been delegated to the Public Works Committee it was the mouthpiece of the Municipality and an order by it giving permission under Sub-section (2) of Section 96 amounted to an order by the Municipality which having been once given could not be revoked in accordance with the decision of this Court in the three cases mentioned in the referring judgments. So far as these cases go, it is clear that Section 36 was not considered in connection with the point there decided and there is no reason to suppose that the provisions of that section had been brought to the notice of

(4) (1859) 26 Beav. 606 = 33 L T. (O.S.) 72 = 58 E. R. 1032

the learned Judges who gave these rulings. This is confirmed by the fact that in the first of these cases, *Emperor* v. *Kareem Ranjan*, (1). Batchelor, J., in giving the judgment of the Court expressly guarded himself by saying : " If, however, words clearly importing such a power subsequently overriding the permission were discoverable in the Statute there would be no alternative but to give effect to them. No such words are, however, discoverable". This overlooks S. 36, Sub-section (2) an enactment which purports to empower the Municipality under certain conditions to override any order given by the Managing Committee and it would therefore, presumably have affected the decision in *Emperor* v. *Kareem Ranjan*, (1) had it been brought to the Court's notice.

I cannot myself find anything in Section 96 which would justify our holding that the Legislature intended that an order by a delegated authority under S 96 should be final, and not subject to modification by the Municipality. What Mr. Thakur mainly relies on is the provision under which, if no orders are issued by the Municipality within one month from the receipt of the notice the applicant has a right to proceed with his proposed building. This, he says, gives the applicant a right to build with which the Municipality cannot interfere and he argues that the provision in rule 58 of the Municipal Rules allowing a period of thirty days for appeal, conflicts with the provisions I have just mentioned. It may be that in the particular case where no orders had been passed within a month of the notice there would be no right of appeal or revision. There would in fact be no order to revise or appeal against. But the present case is on a different footing. There had been an order by the Public Works Committee within the month and also an order by the Municipality suspending the carrying on of the work under Sub-section (3) clause (*a*) and the case does not therefore fall under Sub-section (4) of S. 96. Also in a case where the Committee passes an order, within the one month, refusing to give permission there would clearly be nothing inconsistent in the right of appeal or revision referred to in S. 36, Sub-section (2); on the other hand the present contention would deprive an applicant of this right. Nor is there any other provision in S. 96, which has been shown to be inconsistent with this right of appeal or revision. In fact I think the Legislature has clearly indicated in another part of the Act its intention to allow such interference with the power exercised by a delegate under S. 96. S. 186 G authorizes a Municipal Commissioner to pass orders under S. 96 and this is not one of the powers which can only be exercised with the previous approval of the Municipality under proviso (A) to that section. Then under S. 186 M the Municipal Commissioner may delegate his powers under S. 96 to a Municipal officer or servant, S. 96 not being one of the excepted sections specified. Under Sub-section (2) the exercise or discharge by the delegate of the powers delegated to him under S. 96 is made subject to such conditions and limitations if any, as may be prescribed in the order of delegation, and also to control and revision by the Municipal Commissioner. This gives the Municipal Commissioner clear power to override a permission which may have been given by the Municipal officer or servant to whom the powers had been delegated. Similar provisions are contained in the Bombay City Municipal Act. Under Sections 345 and 346 (1) the Commissioner may pass orders approving or disapproving of a proposed building or work and under Section 68 he can delegate this power to a Municipal Officer in which case the powers are to be exercised or performed or discharged under the Commissioner's control and subject to his revision Therefore there is nothing incongruous in the Municipality exercising a similar right of control and revision over acts of a Committee to whom powers under Section 96 have been delegated. In my opinion, in cases where an order is passed by such a Committee the words "the Municipality" in Section 86 must be read as " the Committee subject to the provisions of Section 36, Sub-section (2)". In so reading it each of the two sections has its proper scope and the Court follows the general principle that due effect should be given to every part of a statue.

Then the question arises whether in this particular case the order passed by the Municipality was one which complies with the requirements of Sub-section (2) of S. 36, that is to say, was it passed in the exercise of authority given to it as a revisional or appellate body under the

rules of the Municipality in force under Section 46 of the Act? In this particular case the application of Chunilal which was made to the Vice-President and by him submitted to the Municipality complains of the order granting permission to the appellant and asks for its revocation by the Municipality. In my opinion it amounted to an appeal and as it was made on the very day on which the order was passed, it was clearly within the time allowed by rule 58.

Mr. Thakur contended that it could not be considered as an appeal because Chunilal was not a party to the proceedings, the main question under S. 96 being between the appellant and the Municipality. But I do not think there is anything in rules 55 to 58 which justifies this narrow construction of the word "appeal". Rule 58, sub-rule (1) speaks of the party affected by the order appealed against and unless the word "party" is to be read in the narrow sense of a party to a suit or legal proceeding it clearly covers the application of Chunilal, who, as a neighbour was affected by the order complained of. In my opinion the word "party" in rules 56 and 58 does not mean anything more than "person" (as it often does, of Stroud's Judicial Dictionary under the Heading "party"); and it would clearly be giving considerable limitation to the right of appeal to read the rules otherwise. Thus, suppose a Committee has given permission to the owner of a building in a public street to put up a balcony projecting from his upper storey, and supposing the owner of the neighbouring building considers that this projection will be an obstruction to the safe and convenient passage along the street, is he not to be considered a party affected who should have right of appeal asking the Municipality to override the permission, in accordance with the provisions of Sub-section (3) of S. 113? I think the answer should be in the affirmative, and that the appeal contemplated in the rules is practically one given to "any person deeming himself aggrieved" by the order complained of. As an analogous case, reference may be made to S. 269 of the Public Health Act of 1875 (38 & 39 Vic. c. 55) giving a right of appeal to such a person from any order, including an order of the kind now under consideration, passed by an authority under that Act.

But even supposing that the application cannot properly be considered as an appeal I think that the case fell within the revisional authority of the Municipality under the rules. Rule 42, in general terms, subjects every delegation of the Municipality's executive functions, power or duties, to the general control of the Municipality, and this rule cannot be limited to executive functions, as opposed to powers of the kind referred to in S. 96, in view of the provisions of rule 45 which speak of executive functions involved in the exercise of a power conferred on the Municipality. It was, therefore, competent in my opinion, for the Municipality to pass their order suspending the proceeding of the building and subsequently to revoke the permission granted by the Public Works Committee. It is a case which can be held to fall under rule 49 read with rule 70, *i.e*, the Vice President, in the absence of the President brought this question to the notice of the Municipality as an instance in which the Public Works Committee seemed to have erred in the exercise of its functions. But, even supposing that the case did not fall under that rule the Municipality, as a revisional authority with a right of general control under rule 42, could, I think, legally interfere with the order of the Public Works Committee. Rule 42 expressly confers this power upon the Municipality, and therefore is excepted from the limitations contained in Rule 54. There is nothing in the rules which shows that it was intended that the Municipality should not be able to act in revision on their own motion, independently of any initiation by the President or the Vice-President under Rules 49 and 50. Rule 42 shows this by using the words "in particular" when referring to the provisions of rules 43 to 55, which imports that the reference was without prejudice to the right of general control previously mentioned. Therefore, in my opinion, the General Body could legally act on its own motion or on the application of a person injuriously affected by the order of the Public Works Committee and the order of revocation was legal.

Answer in the affirmative.

A.I.R. 1922 Bombay 254

MACLEOD, C.J. AND SHAH, J.

The Government of Bombay—Appellant.

v

N.H. Moos Respondent.

O C.J. A. No. 128 of 1921 and reference No. 8 of 1920 decided on 31st March 1922, from a decision of Justice Kajiji.

Land Acquisition Act (1894)—Ss. 18 and 29—Land unfit for quarrying purposes--Should not be valued on the quarrying basis—Toka tenure land —Valuation of occupant's right—Government's interest in the land—Principles of valuation.

Land should not be valued on the basis that it would be used as a quarry, when the evidence shows that it could not be used as a quarry.

Government had a right to increase assessment on certain quarrying land of the Toka tenure in the possession of an occupant who had to pay for it an annual rent, in the year 1929-30 at the rate of four per cent. on the value of the land. When the land was acquired compulsorily by Government in estimating the value of the interest of Government in the land the assessment was capitalised at four per cent. and it was written back at eight per cent to the date of the acquisition.

Held, for valuing the interest of Government in the land the assessment on the land could not be expected to increase in 1929 to a higher rate than two per cent ; and that it should be capitalised at six per cent. and written back at the same rate to the date of the acquisition. A method which has been generally used to arrive at the present value of the rent is to capitalise at a certain rate and then write it back to the date of acquisition the rate of capitalization and the rate of writing back being the same. [P. 255, C. 2]

Thomas Strangman—for Appellants.

B. J. Desai and *Mulla*—for Respondent.

Macleod, C.J.—This is an appeal from the decision of Mr. Justice Kajiji in Land Acquisition Reference No. 8 of 1920. The land in reference was notified for acquisition on the 16th May 1916, it measured 3521-4/9 square yards, and was situated on the Golangi Hill. The photograph of the model at p. 11, Part III, gives us the best idea of the land and its surroundings. Before the Collector it was valued on what I may call a quarrying basis, that is to say, the total cubic contents of stone and Moorum were calculated and a particular value was given to them, written back according to the period estimated to be taken up for quarrying. Nothing was allowed for the land after the quarrying was finished. The total value arrived at by this method was for all interests Rs. 26,454-8-8. As the land is Toka the amount of the Government interest was deducted. Then to what was left was added fifteen per cent. for compulsory acquisition plus Rs. 500 for compensation for severance awarded to the appellant. The total for the claim was Rs. 21,744.

The learned Judge after considering all the evidence before him with regard to the basis of valuation, came to the conclusion that if all the materials that were placed before him had been placed before the Land Acquisition Officer the Land Acquisition Officer would not have valued the land on the quarrying basis. But the learned Judge thought himself bound to hold that the land should be valued on the quarrying basis because that was the basis which was followed according to the evidence on both sides before the Land Acquisition Officer. We think the learned Judge was wrong in valuing the land on the quarrying basis when on the evidence before him he was of opinion that the land could not be used as a quarry. Even then on the evidence the learned Judge valuing the land on the basis that it would be used as a quarry valued all interests at Rs. 41,611 but valued the Government interest on a different basis to that on which it had been valued by the Collector, with the result that the amount awarded to the claimant was Rs. 37,366 plus Rs. 5,604-12 0, fifteen per cent. for compulsory acquisition.

Two questions arise :—(1) what was the proper market value of all interests in the land to be acquired ? and (2) what should be deducted for the value of the Government interest as the land was held on Toka Tenure ? It seems to have been admitted, at any rate for the purposes of argument before us, that the land would be worth in the market Rs. 7 8-0 a square yard if it was used for building purposes. There is no evidence whatever that a purchaser would have offered more than Rs. 7-8-0 a square yard for this land. No evidence was called on either side of any purchases of the land in the neighbourhood, and we have to rely mainly on expert evidence as to what a purchaser would be likely to give for this land. No doubt one is entitled to consider that a purchaser looking at the land, and wanting to buy it, would take into consideration the fact that it rises in pieces to a height of about eighty feet above the ordinary level, and that if he did not wish to build on the surface, he could get some value out of the Moorum and stone beneath the surface,

But all those calculations of the value of the cubic contents of the land above the ordinary level plus the deferred value of the land on the level when the material above it has been removed, appear to me to afford very little assistance to a Court in arriving as to what should be the market value of the land at the date of the notification because no evidence has been adduced from which the Court could hold that a purchaser would enter into all those elaborate calculations and base his offer for the land on the certainty that they would be realized. In all my experience I have never come across a purchaser who said he made hypothetical calculations of this character before he purchased ; they are used by experts to justify an opinion which is as a rule equally valuable and less assailable without them ; and the general fallacy underlying all these hypothetical calculations is this, that the result in the total profit a purchaser may expect on the most favourable estimates, which is a different thing from what a purchaser would give on an estimation of the profit which he would be likely to make, taking all risks into consideration. (His Lordship then discusses the evidence of the witnesses and proceeded). I think that Kajiji, J., was quite right in thinking the evidence showed that the land should not be valued on a quarrying basis. It all amounts to this. There is Moorum and stone underneath the land. Whether it would pay a purchaser to extract it, would be purely problematical, and it has not been shown that a purchaser would be prepared to pay anything more than Rs. 7-8-0 for the land taking all its potentialities, whether for building or for quarrying purposes, into consideration.

We think, therefore, that the Collector's estimate of the value of the land was correct, and that the value of all interests taken on the basis of his award should be Rs. 26,454-8-8 plus Rs. 500 compensation for severance.

Then the next question is as to the valuation of the Government interest, and that is a question of considerable difficulty. There always must be a difficulty in apportioning the total value, arrived at after valuing the land as freehold, between the various parties who have interests in the land, because if an attempt is made to value each of those interests according to its market value, the total value of those interests valued in that way would be most unlikely to correspond with the market value of the land as a freehold. Now this land is Toka land, the occupant of which has to pay at present an annual rent of Rs. 18-5-5. In 1929-30 Government have a right to increase the assessment, and they could levy a rate of four per cent., on the value of the land. It has been generally in such cases taken as the basis for the prospective assessment that the land will be of the same value in 1929 as at the date of acquisition. The rent, therefore, the Government could charge in 1929-30 might amount to Rs. 1,056. A method which has been generally used to arrive at the present value of that rent is to capitalise at a certain rate and then write it back to the date of acquisition, the rate of capitalisation and the rate of writing back being the same.

If the land is valued at the present time at a very low rate and owing to its situation it can be estimated that in 1929 it will be much more valuable so as to be able to bear an assessment of four per cent. on the present value, no doubt that could be taken as a basis for valuing the Government interest. But in this particular case we have to consider whether in 1929 this land could possibly bear a rent of Rs. 1,056 a year. It seems to me the claimant's argument that we cannot calculate that the assessment would be raised higher than two per cent. in 1929 requires to be considered. Looking at the situation of the land, whether we consider that in 1929 all the land would be reduced to the ordinary level by quarrying or whether we consider the land will remain as it is, if the Government rent is to be taken at Rs. 1,056, there would be practically nothing left for the occupant, as he could hardly expect to get a higher rent from a tenant if he let it out either on a building lease or for any other purpose. I quite admit we are in a region of pure speculation, but I think we ought to do that which is most fair to the claimant. We should not expect that the assessment would be increased to a higher rate than two per cent. in 1929, but at the same time we think that the rate on which it was capitalised, namely 8 per cent. was wrong, and that it should be capitalised at six per cent. and written back at the same rate. The result is that the value of

the Government interest is reduced by one half on the amount of the award of the Collector.

The award of Mr. Justice Kajiji is set aside and the Collector's award is varied by apportioning to Government Rs. 3,991 instead of Rs. 7,982. The claimant will get Rs. 3,991 more plus fifteen per cent. and interest at six per cent on the whole from the date of Collector's taking possession up to this day. The Government is entitled to withdraw such amount as has been paid into Court in excess as a result of Mr. Justice Kajiji's award. Government to get seven-eighth of their costs throughout.

Shah, J.—I concur.

Award varied.

A. I. R. 1922 Bombay 256 (1)

MACLEOD, C. J. AND SHAH, J.

B. B. and C. I. Railway Company—Defendant-Applicant.

v.

Shah Saharchand Kalidas, Manager of the Firms of Chimanlal Bagubhai and Shah Sakharchand Bulakhidas—(Plaintiff)-Opponent.

Civil exts. Application No. 303 of 1921, decided on 29th March 1922, against the decision of Judge of Small Cause Court, Ahmedabad, in Civil Suit No. 2015 of 1920.

Railways Act—Risk Note B—Theft in running train—Company is not liable.

If nothing more can be proved except that there was a theft in a running train, then the Companies by the Risk Note Form B are protected. [P. 256, C. 2.]

Campbell—for Applicant.

G. N. Thakur—for Opponent.

Judgment:—The plaintiff sued to recover for the loss of a consignment of molasses. The Judge seems to have found as a fact that there had not been a theft in the running train. Therefore the Company could not escape the liability. But unfortunately the learned Judge went on to make some remarks which were not necessary for the purpose of deciding the case, and if those remarks were to stand, they might be followed in similar cases by the Subordinate Courts; and therefore it is necessary to remark that if there is a theft in a running train then the Companies are protected by Risk Notes.

It is open to the plaintiff in such a case to prove that the theft did not occur in the running train, or that the theft, was brought about by the Company's servants. But if nothing more can be proved except that there was a theft in a running train, then the Companies by the Risk Note, Form B, which is now before us, are protected. Rule is discharged with costs.

Rule discharged.

A. I. R. 1922 Bombay 256 (2).

MACLEOD, C. J. AND SHAH, J.

Mahadeo Krishna Parker and another—Defendants-Appellants.

v.

Tukaram Chaya Kondya and another—Plaintiffs-Respondents.

S. A. No. 394 of 1921, decided on 17th March 1922 from Thana in A. 14 of 1920.

Evidence Act, S. 92—Scope.

Where Appellants knew that the plaintiffs were the true owners it would be a fraud on their part to insist upon their claim to the property under the proviso (1) to Section 92. Even if section 92 did not apply, the appellants could not maintain their claim in equity.

P. B. Shingne—for Appellants.

A. G. Desai—for Respondents.

Judgment—We think that the Judge was perfectly right in referring to the cases of *Ganu* v. *Bhan* (1) and *Maung Kyin* v. *Ma Shewe La* (2). The appellants are in this difficulty that if S.92 be applied, then proviso (1) to that section would admit the evidence, because it would be a fraud to insist upon a claim made by the appellants to property arising out of such a transaction, when the appellants must have known that the plaintiffs were the true owners or if S. 92 does not apply, then the case is not governed by the section or by the rule of evidence which it contains, and in such case the rules of equity and good conscience come into play unhampered by

(1) (1918) 42 Bom. 512=46 I.C. 662=20 Bom L. R. 684.

(2) (1918) 45 Cal. 320=42 I. C. 642=20 Bom. L. R. 278.

the statutory restrictions. In this case it is obvious that the transactions which were entered into beginning with the original sale-deed between the plaintiff 1 and plaintiff 2 were mortgages, and the defendants cannot be allowed now to raise the question that they may have become the owners, when throughout they must have been aware that the plaintiffs were in possession as mortgagors. The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 257 (1)

MACLEOD, C. J. AND SHAH, J.

Parnamachand Chandiram Marwadi—Plaintiff-Appellant. v.

Kashinath Deoram Lonari and others—Defendants-Respondents

S. A. No. 688 of 1921, decided on 17th March 1922 from Nasik in A. 256 of 1920.

Limitation Act, Arts 120, 61—Defendant misusing plaintiff's land without permission—Plaintiff fined—Suit for recovery of fine—Art. 120 applies.

Where the defendant used the plaintiffs land without his permission for non-agricultural purposes and in consequence thereof the plaintiff had to pay fine to Government and the plaintiff sued the defendant for recovery thereof *held* that the suit is governed by Art. 120 and not 61.

A. G. Desai—for Appellant.

P. B. Shingne—for Respondent.

Judgment:—The plaintiff was the owner of a certain piece of land on which the father of defendants 1, 4 and 5 put up lime-kilns without the plaintiff's or his vendor's permission. Government fined the plaintiff Rupees 450 for having used the land for non-agricultural purposes. The plaintiff paid the money on the 5th May 1916, and filed this suit on the 5th July 1919 to recover the amount from the defendants. The defendant No. 1 by his written statement contended that the plot whereon the chunam kilns were situated had been in possession of the defendants as owners for a number of years. All the issues were found in favour of the plaintiff, except the issue of limitation, the lower Court holding that Article 61 appeared to apply to the suit. Article 61 refers to suits for money payable to the plaintiff for money paid for the defendant. In appeal the learned District Judge also thought that although Article 61 did not exactly cover the case it could be considered as applicable by implication. But we cannot agree with that opinion, because if the suit does not directly come within Article 61 or any other particular Article, it must follow that the only article applicable is Article 120. The plaintiff did not pay this money for the defendant. The plaintiff was the occupant of the land and was liable to Government for having used the land for non-agricultural purposes. The Goverement were not concerned with the question whether such user was by the occupant or by tenants or by trespassers. The plaintiff was directly liable and no question of contract arose clearly on the pleadings as there was no contractual relationship between the plaintiff and the defendants who were using the lands as their own. We, therefore, reverse the decree of the lower Appellate Court and decree the plaintiff's claim with costs throughout. Interest on Judgment at 6 per cent. from the date of this judgment.

Appeal allowed.

A. I. R. 1922 Bombay 257 (2)

SHAH AND PRATT, JJ.

Madharao Moreshwar Bhandarkar—Plaintiff-Appellant. v.

Krishnaji Saturao Rane and others—Defendants 1, 2 and 4-Respondents.

S. A. No. 758 of 1920, decided on 14th October 1921 from a decision of District Judge, Ratnagiri, in A No. 60 of 1920.

(a) *Bombay Act I of 1880—Khoti Settlement Act, S. 10—Transfer of a Portion of the Khoti land by the occupant—Only such portion will be at the disposal of the Khot.*

There is no indication in S 10 of the Bombay Khoti Settlement Act that all the lands of the occupant are intended to be at the disposal of the Khot even though one of them or only a portion of one land may have been transferred, by him without the consent of the Khot.

[P. 259, C. 1.]

(b) *Interpretation of Statutes — Forfeiture clause should be strictly construed.*

Courts have to construe clauses of forfeiture strictly so as to involve least interference with the existing rights consistently with the plain meaning of the words used by the Legislature (Per Shah, J.) [P. 259, C 2.]

Per *Pratt, J*—It is a recognised principle that the construction which appears the most agreeable to reason and justice should in all cases be presumed to be the true one.

[P. 260, C. 2.]

P. B. Shingne—for Appellant.

A. G. Desai—for Respondents No. 1, 2 and 4.

Shah, J.:—The question of law that arises in this second appeal relates to the construction of Section 10 of the Bombay Khoti Settlement Act of 1880 as amended by Bom. Acts VIII of 1912 and IV of 1913. The facts, which are not in dispute, are these. The plaintiff is the Khot and the defendants are the occupancy tenants and

their transferees. It appears that there are several Survey Numbers referred to under six serial numbers in the plaint in which the occupants had a certain share. The interest of the occupants in one of these lands referred to in the plaint as Serial No. 1 was mortgaged by them in January 1914. It appears from the mortgage bond that they had already mortgaged this property so far back as 1872, and this was a fresh mortgage. We are, however, concerned with the fresh mortgage effected in 1914, after the amending Acts of 1912 and 1913. The Survey Numbers have been described as appertaining to four different Khotas, and it is claimed for the plaintiff that in virtue of the provisions of Section 10 of the Khoti Settlement Act, as it stood at the date of this transfer by way of mortgage, all the lands constituting these different Khatas, of which the land, referred to as Serial No. 1 in the plaint, is a part, and in which the defendants as occupants have an interest, are at his disposal, as the transfer was without his consent.

The Trial Court accepted this view and passed a decree in favour of the plaintiff in respect of all the lands constituting the different holdings, of which the land mortgaged form comparatively a small part.

The Appellate Court, however, did not accept that view, and held that the lands which were at the disposal of the Khot in virtue of the provisions of Section 10 were really those lands which formed the subject-matter of the transfer, and accordingly dismissed the plaintiff's suit, except as to land Serial No. 1.

The question that has been argued in this appeal by the Khot is as to whether on a proper construction of Section 10 all the holdings, of which Serial No. 1 forms a part, are at the disposal of the Khot or only that part of the land which is transferred. The section as amended by Bom Acts. VIII of 1912 and IV of 1913 runs as follows:—

" If the land held by a privileged occupant lapses for failure of heirs or is forfeited on the occupant's failing to pay the rent due in respect thereof, or if any occupancy tenant resigns his land or any portion of his land or does any act purporting to transfer his land or any portion thereof or any interest therein without the consent of the Khot (except in the cases provided for in Section 9,) his lands shall be at the disposal of the Khot as Khoti land free of all incumbrances, other than liens or charges created or existing in favour of Government".

" But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot; and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector".

I need not quote Sections 9 and 10 as they stood prior to the amending Act of 1912. The effect of these sections prior to 1912 was that, except in certain cases expressly provided for by Section 9, the occupancy was not transferable. But no consequence of a transfer of any interest in the occupancy, contrary to the provisions of Section 9 was stated in the Act. Among other things by the amendment of 1912 the Legislature provided that any transfer contrary to the provisions of Section 9 would involve the consequence that the land would be at the disposal of the Khot free of all encumbrances.

The question to be considered is whether the Legislature intended that by the transfer of any part of the land or of any interest therein, only that land was at the disposal of the Khot, or whether all the lands comprised in different Khatas, of which the land wherein the interest of a sharer is transferred formed a part were at the disposal of the Khot. It appears that by the Act of 1913 certain alterations were made in Sections 9 and 10, as enacted by the amending Act of 1912. But those alterations were apparently the result of the change in the definition of the word " holding " as given in the Act of 1913. In any case it seems to me that all the alterations made by the Act of 1913 were merely consequential and do not affect the point under consideration. The alteration, with which we are concerned, is the substitution of the word 'his' for 'such' in Section 10. The section provides that on the transfer of his land or any portion thereof or any interest therein" his land shall be at the disposal of the Khot. This means that where the transfer be of any portion of the land or any interest therein, what shall be at the disposal of the

Khot is not merely that portion or that interest but the land itself. But the section gives no indication as to whether it means all lands comprised in the different Khatas of which the particular lands form a part or merely the land, *i. e.*, the particular Survey Number or any recognized sub-division in respect of which there has been a transfer. The section does not state as to what is to be treated as the unit for the purpose of giving effect to the provision that his land shall be at the disposal of the Khot. This provision deprives the occupant of his existing rights in consequence of a transfer of his interest in the land not allowed by law. In the absence of any clear indication to the contrary it seems to me that such a provision should be so construed as to limit the forfeiture to the land, the interest wherein is transferred. There is no indication in the section that all the lands of the occupant or intended to be at the disposal of the Khots even though one of them or only a portion of one land may have been transferred. The second paragraph of the section so far as it provides that it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot suggests, if at all, that but for that provision the meaning of the first paragraph as regards the resignation in respect of any land or portion of the land would be that the land resigned and not necessarily the entire holding would be at the disposal of the Khot. The consideration that an occupant cannot resign a part of the entire holding without the consent of the Khot would not, in my opinion, justify the wider construction of the section which the trial Court accepted in this case, as regards the effect of an unauthorized transfer.

However that may be, it seems to me clear that as regards an improper transfer, the consequences must be limited to the land transferred and cannot be reasonably extended to the entire holding or to all the lands comprised in the occupancy. For this purpose the smallest unit recognized by the Khot Settlement Act must be taken, *i. e.*, a Survey Number or a recognized sub-division thereof as defined by the Bombay Land Revenue Code.

The land affected by the transfer in the present case is only Serial No. 1, and that, in my opinion, is the land at the disposal of the Khot under Section 10 of the Khoti Settlement Act in consequence of the transfer effected in 1914.

If this reading of the section does not represent the true intention of the Legislature, it seems to me that the section must be amended so as to convey the true meaning. The Courts have to construe such clauses of forfeiture strictly so as to involve the least interference with the existing rights consistently with the plain meaning of the words used by the Legislature.

I would confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Pratt, J.—Defendants Nos. 1 to 4 and 6 represent four brothers and are permanent tenants in the Khoti village of Ghousari and have four holdings or Khatas which include twenty-eight different Survey Numbers and Pot Numbers in that village.

Survey No. 268, Pot No. 2, is common to the four holdings and each holding comprises a one-fourth share of it. These defendants mortgaged that Pot Number on the 27th January 1914 to defendant No. 5. This mortgage was not justified by the provisions of Section 9 of the Khoti Settlement Act. The question for decision in this appeal is what penalty attaches under Section 10. Are all the lands (all the Survey Numbers and Pot Numbers) in the four holdings at the disposal of the Khot or only the particular Pot Number mortgaged?

The District Judge has held that the Khot is only entitled to the particular Pot Number. The District Judge has based his decision on a consideration of Section 10 of the Khoti Settlement Act of 1880 as amended by Bom. Act VIII of 1912 but overlooked the amendment made by Bombay Act IV of 1913. This is a very excusable error, for the Legislative Department of the Government of Bombay have issued no edition of the Khoti Settlement Act since 1904, and no edition of the Bombay Code later than 1909.

It is, therefore, desirable to set forth in parallel columns the section as it stood after the amending Acts of 1904, 1912

nd for more convenient study I shall put—the clauses in parallel columns :—

1904.	1912.	1913.
If a privileged occupant re-ign the land or any portion of he land in his holding, or if ny such occupant's land lapse or failure of heirs, or the per-ons entitled thereto, or is orfeited on the occupant's ailing to pay the rent due in espect thereof, the land so esigned lapsed or forfeited, hall be at the disposal of the Khot as Khoti land free of all ncumbrances, other than liens r charges created or existing n favour of Government.	If the land in the holding of a privileged occupant lapses for failure of heirs or is forfeited on the occupant's failing to pay the rent due in respect thereof, or if any *occupancy tenant* resigns the land or any portion of the land in his holding, or does any act purporting to transfer such land or any portion thereof or any interest therein without the consent of the Khot (except in the cases provided for in S. 9), *such* land shall be at the disposal of the Khot as Khoti land free of all encumbrances, other than liens or charges created or existing in favour of Government.	If the land held by a privileged occupant lapses for failure of heirs or is forfeited on the occupant's failing to pay the rent due in respect thereof, or if any *permanent tenant* resigns his land or any portion of his land, or does any act purporting to transfer his land or any portion thereof or any interest therein without the consent of the Khot (except in the cases provided for in S. 9.) *his* land shall be at the disposal of the Khot as Khoti land free of all encumbrances, other than liens or charges created or existing in favour of Government.
But it shall not be competent o a privileged occupant at any ime to resign a portion only f his entire holding except with the consent of the Khot ; nd no privileged occupant hall be deemed to have forfeit-d his land on failure to pay ent unless such forfeiture is ertified by the Collector.	But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Knot; and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector.	But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot ; and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector.

In 1904, the penalty attached in cases of resignation, lapse for failure of heirs and forfeiture for non-payment of rent.

In 1912, the penalty was extended to cases of transfer unauthor zed by S. 9, and this was in consequence of the decision in *Yesa* v. *Sakharam Gopal* (1).

In 1913, the amendments were merely verbal, the phrase "permanent tenant" being substituted for "occupancy tenant" and "his land" for "such land".

Now the case to be considered is one of unauthorized transfer referred to in the fourth clause of the section of 1913. The penalty refers to "his land" and this penalty attaches if "*his land or any portion thereof or any interest therein*" is unauthorizedly transferred.

Literal grammatical construction would lead to the consequence that a transfer of a portion of the land or an interest in that portion would involve all the land held by the permanent tenant being at the disposal of the Khot. But if there is any ambiguity in the language, the Court may adopt that construction which avoid hardship or injustice. For it is a recognized principle that the construction which appears to be the most agreeable to reason and justice should in all cases be presumed to be the true one. The phrase "his land" applies as well to all the land in the holding as to the portion transferred. It is, therefore, ambiguous, and it is more reasonable to construe it as referring to the portion transferred rather than to the whole, for if Legislature intended to impose the severer penalty, it would have made that clear by the use of some such words as "all his land" or "the whole of the land in his holding."

Cases of lapse for failure of heirs or forfeiture for failure to pay rent necessarily affect the holding and need not therefore be considered. But the case of resignation may either be of the whole or of a part and therefore affords a guide to the intention of the Legislature.

(1) (1905) 30 Bom. 290=7 Bom. L. R. 941.

Now in 1904 it was quite clear that resignation of "the land or any portion of the land in his holding" involved as penalty affecting only "*the land so resigned*".

The Legislature, when including a penalty for unauthorized transfer, in 1912, could not have intended to enhance the penalty for resignation. So, the words "such land" in the penal clause in 1912 and "his land" in the same clause in 1913 must mean the land *or portion of land resigned*. And indeed this must be so, for a resignation of a portion is only effective with the consent of the Khot, and therefore the very phrase implies that Khot takes back a portion and the permanent tenant continues his permanent tenancy of the remainder. If the word "such" in the penal clause in 1912 includes a portion with reference to resignation, it must also be similarly construed with reference to the clause dealing with unauthorized transfers.

There could be no doubt about this but for the unfortunate phrase in that clause "such land or any portion thereof". This clause follows on the resignation clause when words are "the land or any portion of the land in his holding". "Such land", should, therefore refer back to this phrase and include the portion and so the words "or any portion thereof" are redundant and meaningless. If these words are omitted from that clause, all the clauses of the section of the Act of 1912 are harmonious and consistent. It is the unskilful draftsmanship of the section of 1912 and that is the cause of the obscurity. And this was not remedied in 1913 when the word "his" was substituted for "such" overlooking the fact that the word "such" had two different meanings in the fourth clause and in the penal clause of the section of 1912.

It is true that transfer stands on a different footing to resignation. There can be no resignation of a portion without the consent of the Khot. The tenant may cease cultivating a portion but he would still have to pay the rent of the whole tenancy. The resignation is only effective when the Khot accepts the portion surrendered and then there is a proportionate remission of rent presumably under Section 33, rule 11 (*b*). The penalty in the case of resignation of a portion is not so much a penalty as a statement of the consequence of the resignation. An authorized transfer is similarly ineffective but it calls for a penalty inasmuch as it introduces a tenant whom the Khot may not like, and who may, by prescription, acquire the right of a permanent tenant and prejudice the Khot's reversionary interest. Can it be said that these considerations induced the Legislature to impose a severer penalty for the unauthorized transfer ? or that the effect of limiting the penalty to the portion is to allow the tenant to do indirectly what he cannot do directly by resignation? I think not. In the first place no prescriptive title would be acquired against the Khot unless he accepted rent from the transferee and that would in itself involve consent to the transfer. Nor would the attempted transfer of the portion be equivalent to a resignation of that portion for the tenant would still have to pay the whole rent of his holding.

On the whole my conclusion is that the difficulty is due merely to unskilful draftsmanship. In *Salmen* v. *Duncombe* (2) the Privy Council declined to allow a statute to be reduced to a nullity by the draftsman's unskilfulness and ignorance of law, and I think we would be justified in refusing to allow the same defect to lead to hardship and injustice. I, therefore, think that the phrase "his land" in the penal part of the section means the portion of the land in the holding which is purported to be transferred or in which an interest is purported to be transferred.

I, therefore, agree that the appeal should be dismissed with costs.

Appeal dismissed.

(2) (1886) 11 App Cas. 527=55 L. T. 446=55 L. J. P. C 69.

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PRATT, J., ON DIFFERENCE OF OPINION MACLEOD, C. J., SHAH AND PRATT, JJ.

Emperor — Appellant.

v.

Venkatarao Rajerao Mudvedkar—Respondent.

Cr. App. No. 747 of 1921, decided on 14th February, 1922 from an order passed by S. J., Dharwar.

Penal Code (1860), *S.* 228 — *Contempt of Court-Cr. P. C.*, (1898), *S.* 480.—*Imputation of prejudice to presiding Judge, made in accused's statement is contempt.*

The accused, tried for rioting when asked to make a statement under S. 342, Cr. P.C. called

the trial Judge, "a prejudiced Judge." When he was asked to withdraw the statement he refused to do so. The Judge then held a proceeding under S. 480, Cr. P. C. and the accused was convicted of an offence punishable under S. 228 of the I. P. C. On appeal.

Held, (Shah, J. dissenting) that, the accused was guilty of the offence charged, for his intention to offer an insult to the Judge was made out first by the words themselves, and, secondly, by the conduct of the accused.

Per *Macleod, C. J.*—No system of justice can tolerate unbridled license on the part of a person defending himself or accept, as an excuse for an insult to a Judge that it was necessary for the conduct of the defence or for the establishment of his innocence. [P. 264, C. 2.]

Per *Shah, J.*—It is impossible to hold that in saying what the accused did say his intention was to offer an insult to the Judge. His conduct is consistent with the view that his intention was to press a defence which was adopted and adhered to without sufficient thought and which was couched in improper language and not to offer an insult to the Judge. [P. 265, C. 1, 2]

Per *Pratt, J.*—"The only question is whether the insult was intentional, and on this point it is clear that this intention is an inference attaching to the words themselves, and this inference is not rebutted by any *excuse* as to the motive with which the accused used the words or the object that he thought would be attained by so doing. [P. 266, C. 2.]

S. S. Patker—for the Crown.

G. N. Thakur—for Respondent.

Macleod, C. J.—The appellant was convicted by the Sessions Judge of Dharwar of an offence under Section 228 of the Indian Penal Code and fined Rs. 50 by an order passed under Section 480 of the Criminal Procedure Code. The appellant was one of the accused in what is known as the Dharwar riot case who were being tried before the Sessions Judge sitting with assessors.

The appellant was questioned by the Judge as follows:—

Q.—Did you make the statement before the Magistrate which is now read over to you?

A.—Yes.

Q.—Have you anything further to say?

A.—I wish to put in a written statement.

Q.—You have begun reading that statement and stated that the Judge is prejudiced against you. Are you willing to withdraw those words?

A.—I decline to withdraw them.

Q.—Are you aware that you are liable to be dealt with for contempt?

A.—Yes.

Q.—You have read your statement. Have you anything further to say?

A.—No.

The appellant's statement began as follows:—

1. I have been practising as a pleader in this District for the last fourteen years.

2. The first and the fundamental requirements of a judicial trial are chiefly these.

(*a*) Investigation by impartial and independent persons;

(*b*) an impartial and independent Judge; and

(*c*) an impartial and independent prosecution.

3. In this trial not only are the above three elements wanting but there is positively an admixture of contrary elements in all these branches, *viz.*, (*a*) investigation by persons who are guilty of the murder of innocent and unarmed persons; (*b*) a prejudiced Judge; (*c*) lastly, prosecutors some of whom are hired for a definite purpose.

The appellant was asked after the midday recess if he had reconsidered his statement but replied that he declined to withdraw it. He said his statement did not amount to an offence, and moreover, the Court having risen for the recess had no power to pass any order. There was nothing in that point as an order can be passed at any time before the Court rises for the day.

As mentioned above the appellant was then convicted of contempt and fined Rs. 50 or in default fifteen days' simple imprisonment.

The defence so far as it has been urged before us and so far as it can be extracted from the petition in appeal appears to be that the appellant during the course of the trial had formed an honest opinion that the Judge was prejudiced against the accused including the appellant and that while the appellant was in this honest state of mind brought about by circumstances over which he had no control he was called upon to make a statement; that it was at that stage that the appellant succumbed to the very natural desire of asserting his innocence and for that purpose of giving expression to the feelings he entertained about the prosecution against him by making a clean breast of all that he truly and honestly believed about the prosecution and the trial; that this

desire became all the more natural and necessary as the learned Judge was being assisted by assessors whose opinion had also to be moulded by properly explaining to them the attitude of the appellant and that there was no intention what the part of the appellant to insult the Court.

Now I do not think that the law regarding contempts is any different in India to what it is in England. To say that the Judge trying a case is prejudiced is an insult and in the first instance the words carry with them the intention to insult. It lies on the person uttering them to provide an explanation to show there was no such intention. They may have been uttered in the heat of an argument and the absence of intention to insult may be proved by taking the opportunity when offered to withdraw them. No counsel or pleader could be allowed to persist in making such an imputation against the trying Judge and though it may be admitted that a person conducting his own defence is allowed a greater latitude than legal practitioners, that must not be strained beyond the limits of decency.

Cases in which applications for transfer are made stand on an entirely different footing to the present one. As a rule they are not made because it is alleged the trying Judge is incompetent to come to a just decision but because there are circumstances beyond his control such as acquaintance with one of the parties or a personal interest in the subject-matter of the proceedings which in law are considered as preventing him from giving an unbiassed decision. It must also be remembered that on any such allegation being made, the Judge is afforded an opportunity of giving an explanation and the superior tribunal only expresses its opinion after full consideration of all the circumstances in the case.

It is a different matter when in the course of a trial a party defending himself commits direct contempt of the Court and if I were to decide that it was sufficient excuse for him to say that there was no intention to insult, I should be dealing a blow to the authority of the Courts the consequence of which would be disastrous beyond contemplation.

Speaking for myself I do not think we should lightly interfere in appeal with the decision of a Judge in a matter of contempt as he would be far more competent to ascertain whether the intention to insult was present or not. The test is not to my mind whether I, on reading those papers or hearing arguments, were to think that I should have forborne from taking notice of the appellant's statement but whether there is anything to show that the Judge was wrong in holding that there was contempt. Contempt of Court which is not a Court of Record can only be made an offence by legislation but it is an offence of an entirely different nature from the ordinary offences defined by the Penal Code and so in my opinion appeals from convictions for contempt should be dealt with having due regard to that fact. In *King* v. *Davison* (1) the defendant was fined by the Judge three times for making insulting and irrelevant remarks in the course of his address to the Jury, while defending himself against an indictment for blasphemous libels. He afterwards submitted himself to the Court and the fines were remitted. On a motion for a new trial on the ground that the Judge had no power to fine for contempt a defendant for impropriety in the course of his speech to the Jury, for the reason that men should not be deterred to take their remedy by due course of law, the points at issue may not have been exactly the same as in this case, but the principles which should govern a Judge in the face of insult are very clearly laid down It was held that a Judge at *nisi prius* had the power of fining a defendant for a contempt committed by him in addressing the Jury, for every man who came into a Court of Justice either as a defendant or otherwise must know that decency was to be observed there, that respect was to be paid to the Judge and that in endeavouring to defend himself from any particular charge he must not commit a new offence.

I cannot do better than cite in full the remarks of Abbot, C. J., who said (p. 333).

" If I thought that the decision I am about to pronounce could have the effect of restraining any person who may hereafter stand on his trial from making a

(1) (1821) 4 B. & Ald. 329=106 E. R. 958.

hold as well as a legitimate course of defence, I would pause before I pronounced that decision. The question, indeed, is a momentous one. It is absolutely a question whether the law of the land shall, or shall not continue to be properly administered. For it is utterly impossible that the law can be so administered if those who are charged with the duty of administering it, have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the Judges not for their personal protection but for that of the public. And a Judge will depart from his bounden duty, if he forbears to use it when occasions arise which call for its exercise. I quite agree that this power more especially where it is to be exercised on the person of a defendant, is to be used with the greatest care and moderation."

And the learned Chief Justice concluded by saying (p. 335):

"Upon the whole, I think that the law cannot be properly administered unless this power of fining exists; and that the exercise of it, on the present occasion, was called for by the conduct of the defendant; and, being perfectly satisfied that the effect of it was not to deprive the defendant of anything that might have served him in his address to the Jury, I am clearly of opinion, that we ought not to grant a new trial."

Holroyd, J. said (p. 339):

"In the case of an insult to himself it is not on his own account that he (the Judge) commits, for that is a consideration which should never enter his mind. But, though he may despise the insult it is a duty which he owes to the station to which he belongs, not to suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the dignity of his station, and uphold the law, so that, in his presence at least, it shall not be infringed."

And Best, J. said (p. 341):

"It has, since Carlile was tried, been seen, that persons indicted for libels who defend themselves, think that they may insult the Judge, calumniate all who are in authority in the country, and utter blasphemy more horrible than that for which that defendant was convicted."

It may very well be that if an accused person ignorant of the law in defending himself is punished for introducing irrelevant matter, such punishment might be held to be not justified unless the party deliberately persisted after warning, but no system of justice can tolerate unbridled license on the part of a person defending himself or accept as an excuse for an insult to a Judge, that it was necessary for the conduct of the defence or for the establishment of his innocence. The Sessions Judge did no more than his duty in drawing the attention of appellant to what he had written in his statement. Very fairly he gave the appellant an opportunity to withdraw it. The only result was the objection that the Court having risen for a short time in the middle of the day, the power of the Court to punish for the contempt was lost. Clearly the intention of the appellant was to insult the Judge and as Best, J., remarked "to calumniate all who are in authority in the country." There is nothing in the petition of appeal which could lead me to come to a different opinion.

The conviction, I think, was right and the appeal should be dismissed.

As my learned brother is of opinion that the appeal should be allowed, the appeal must be referred to another Judge.

Shah, J.—This is an appeal under Section 486 of the Code of Criminal Procedure from an order made by the Sessions Judge of Dharwar against the appellant under Section 480 of the Code.

The order was made as in the opinion of the learned Judge on an offence described in Section 228, Indian Penal Code and it was committed by the appellant in his view or presence. The learned Sessions Judge has not referred to Section 228, Indian Penal Code in his order: but it is clear that on the facts the only section out of those mentioned in Section 480 of the Code that he could have in view would be Section 228, Indian Penal Code.

I need not recapitulate the facts which led to these proceedings, as they have been detailed in the judgment of my Lord the Chief Justice. I have perused the whole of the statement made by the appellant as an accused person in the course of the trial. He was one of the several

accused persons and read his written statement which contains the statement as regards the Judge.

The question that we have to decide in this appeal is whether the appellant intentionally offered an insult to the learned Judge within the meaning of Section 228 of the Indian Penal Code in making the statement. We are not in any sense concerned with the merits of the statement in question nor with the merits of the written statement filed by him as regards the charges against the appellant at the trial; and I express no opinion whatever on the point.

In determining the intention of the appellant, we must have regard to all the facts. He made the statement in the course of a statement, which he was entitled to make as an accused person under Section 342, Criminal Procedure Code, and though he was a pleader of standing and experience, he was then in the position of an accused person defending himself. On the other hand we must have regard to the expressions used and to the context in relation to which they were used as also to the fact that he adhered to them in spite of an opportunity very fairly offered by the trial Judge. It is clear that an accused person like any other person can be guilty of an offence under Section 228 if he contravenes the terms of the section by any act or words of his own. The law imposes the restriction upon an accused person as much as upon any other person; and while a reasonable latitude ought to be allowed to an accused person in making his own defence he cannot be allowed to act in any manner which offends against the section.

The sole question in this case is whether the accused has transgressed the reasonable limits within which he is perfectly free to put forward his defence. I have carefully considered this question. While I do not for a moment approve of the manner in which he has put forward his defence, the merits of which will have to be considered in the appeal from the convictions at the trial, I am unable to hold that in saying what he did say, his intention was to offer an insult to the Judge: at least I feel very doubtful that that was his intention. His conduct is consistent with the view that his intention was to press a defence which was adopted and adhered to without sufficient thought and which was couched in proper language and not to offer an insult to the Judge.

In coming to this conclusion, I have not overlooked the observations in *King v. Davison*. (1) While I agree that these observations are very useful in dealing with each case of this type as it arises, we have to decide this appeal on facts with reference to the precise language used in a statute. The expressions were used by the accused in that case under different circumstances, and the point which the Court had to consider was whether the accused was entitled to a new trial on the ground of prejudice to his defence at the trial in consequence of the contempt proceedings. It appears from the judgment of Bayley, J., in that case that the Judge alone was competent to determine whether what was done would be contempt or not, and that neither that Court nor any other co-ordinate Court had a right to examine the question whether his discretion in that respect was fitly and properly exercised. It also appears from the judgment of Best, J., who had originally punished Davison for three contempts that he had ordered the fines to be taken off as the accused had submitted to his authority. At the same time I recognize that the observations with regard to the Court's powers and duties should be borne in mind while deciding a case of contempt under the Criminal Procedure Code, or under the Indian Penal Code. It must be remembered that here an appeal is expressly provided by the Code against an order made by a Court under Section 480, Criminal Procedure Code and that we are not concerned with the question whether such a sentence has prejudiced the appellant in any sense at the trial but with the question whether the appellant intentionally offered as insult to the trial Judge, as required by Section 228, Indian Penal Code. The contempt cases are not always easy to decide: and the same conduct particularly when it is near the line as in the present case, is apt to strike different minds in different ways. On a consideration of all the facts appearing on these proceedings, I am unable to affirm the proposition that his intention to offer an insult to the trial Court is made out beyond a reasonable doubt.

I would, therefore, allow the appeal, set aside the order and direct the fine, if paid, to be refunded.

Owing to difference of opinion between the C. J., and Shah, J. the case was heard on the 11th February 1922 by Pratt, J.

Pratt, J.—The accused in this case has been fined for contempt of Court in a summary proceeding held by the Sessions Judge of Dharwar under Section 480 of the Criminal Procedure Code. On an appeal to this Court there was a difference of opinion between Macleod, C.J. and Shah, J. and the appeal has been referred to me for decision.

The contempt was the offence defined in Section 228 of the Indian Penal Code. The accused was on trial for offences of riot, mischief by fire and attempt to murder and when opening his defence put in a written statement complaining that he was being tried by a prejudiced judge.

Such words are a gross insult to any Court of Justice, but Shah, J. came to a conclusion which is expressed in the following passage from his judgment:—

"His conduct is consistent with the view that his intention was to press a defence which was adopted and adhered to without sufficient thought and which was couched in proper language and not to offer an insult to the Judge."

With great respect, it seems to me that this passage confuses motive with intention. The accused's motive for using the offensive expression was to support his defence. But if the words are an offence, the excellence of the motive will not make them lawful. A Frontier Tribesman has been known to cross the border and cut off a British Bania's head merely in order to test the blade of a new sword. The motive was simple, innocent and childlike, but the intention was nevertheless murder.

I agree with Shah, J., that the motive of the accused was to justify his defence. His defence was that the riot had been organized by the Police and the District Officers, that the investigation had been conducted by guilty officials in order to falsely implicate him. It was an infamous defence which he could not hope to substantiate either by the cross-examination of prosecution witnesses or by the examination of witnesses for the defence. He, therefore, sought for various excuses for his omission either to cross examine or to examine witnesses. One of the excuses was that it was futile to call evidence before a prejudiced Court.

No doubt, the statement did to some extent serve the purpose of his defence and was made with that motive, but it is nonetheless an offence if the intention was to insult.

I think the same fallacy underlies the judgment of the Allahabad High Court in *Emperor* v. *Murli Dhar* (2). A suggestion of prejudice was made in a petition praying for an adjournment in order to apply to the High Court for transfer. The High Court reversed the conviction under Section 228 apparently on the ground that "the immediate object of the application was to obtain an adjournment." But surely, however legitimate the object, it was not lawful to commit an offence in order to attain that object.

That question is whether the insult was intentional and on this point I think it clear that this intention is an inference attaching to the words themselves, and this inference is not rebutted by any *excuse* as to the motive with which the accused used the words or the object that he thought would be attained by so doing.

The referring judgment of Macleod, C.J. has been severely criticised on the ground that it is based on *King* v. *Davison* (1) which deals with the more extensive jurisdiction as to contempt of superior Courts of Record. But that case is relevant as showing that the Summary Jurisdiction for contempt is essential to the proper administration of justice and that it is exercised not from any exaggerated notion of personal dignity but to prevent instances of indecorum occurring in Court.

On the other hand, also with respect, I differ from Macleod, C.J. when he says that the offence under S. 228 of the Indian Penal Code is of an entirely different nature from other offences as defined in the Penal Code. In all offences in the Penal Code where the intention is an essential ingredient of the offence, that intention must be strictly made out by the prosecution. This rule applies to the offence under Section 228 and it is also the

(2) (1916) 38 All. 284=33 I. C. 643=14 A. L. J. 247.

duty of the Court of Appeal to decide if the intention is proved. Possibly, however, all that Macleod, C.J. meant was that the trying Judge's appreciation of the intention should not lightly be set aside, for apparently innocent words might be uttered in a manner which was contemptuous. I doubt if this consideration was properly appreciated by Shah, J in his hesitating conclusion that "the same conduct particularly, when it is near the line as in the present case is apt to strike different minds in different ways".

However that may be, I find that the intention is clearly made out in the present case: first, by the words themselves, and, secondly, the conduct of the accused. When the Judge took proceedings for contempt and the accused found that the Judge put an unfavourable construction on his words he offered no explanation. The effect of this was, I think, that he persisted in them in the sense put upon them by the Judge.

I, therefore, confirm the conviction and sentence and dismiss the appeal.

Conviction and sentence confirmed.

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MACLEOD, C.J. AND SHAH, J.

Jethalal Girdhar—Defendant-Appellant,

v.

Varajlal Bhaishankar—Plaintiff and Defendant No. 4 Respondent.

S.A. No. 251 of 1920, decided on 21st February 1921, from the decision of D.J., Ahmedabad, in A. No. 100 of 1918.

Civil P.C. (Act V of 1908), O. XLI, Rr. 33 and 23—Decree—Ex parte—Appeal—Appellate Court has power to remand for retrial—C.P.C., S. 151.

The pleader of the defendants presented an Application for adjournment on the day fixed for hearing. The Court refused the application, proceeded to hear the plantiff's evidence *ex parte* and passed a decree. On appeal the Appellate Court held that although sufficient reason had been shown for adjournment, it had no power to remand except when the case came within O. XLI, R. 23, C.P C.

Held the power of remand by the Appellate Court could not be limited to the case described in O. XLI, R. 23. The lower Appellate Court has the power to consider the question whether the suit was heard *ex parte* against the appellant on sufficient grounds. If the Appellate Court is minded under the circumstances of a particular case to reverse the decree of the Trial Court and to remand the suit to that Court for a retrial, it has power to do so. It may be that a case may not fall within the scope of R. 23, O. XLI, but the words of R. 33, O. XLI as also the provisions of S. 151 are wide enough to save the power of the Appellate Court to make an order suited to the circumstances of the case or in the interest of justice, and if necessary to remand the suit for a retrial. [P. 270, C. 2,]

G. S. Rao—for Appellant.

G. N. Thakor—for Respondent No. 1.

Macleod, C.J.—The plaintiff filed this suit in the Court of the First Class Subordinate Judge of Ahmedabad, claiming certain relief from the defendants with regard to a deposit receipt for Rs. 10,000 of which he claimed to be the owner. The case came on for hearing on 5th of February 1918. The pleader for the defendants Nos. 1 to 3 presented an application to the Judge for an adjournment on the ground that the 1st defendant had gone to Bombay as his son was affected by plague and as he fell ill there, he could not come. That application was refused and the Court proceeded, after hearing the plaintiff's evidence, to pass a decree on the 16th February 1918 in favour of the plaintiff. The result was that the case was heard *ex parte* without hearing the evidence of the defendants although their pleader was present.

The defendants then had three remedies; they might have applied to the trial Judge to set aside the *ex parte* decree under O. IX, R. 13; they might have applied for a review ; or they could appeal under S. 96. They chose to appeal. One of the grounds of the appeal was that the lower Court should have granted the adjournment asked for and not proceeded with the hearing of the case. The learned appellate Judge was of opinion that the first defendant should have been granted an adjournment since sufficient reason for his absence on the 5th February was shown and that if an application had been made under O. IX, R. 13 the Court might have set aside the decree, especially as defendants Nos. 2 and 3 were minors. He considered that if the defendants, without making any such application to the trial Court, appealed against the decree as it stood and asked the Appellate Court to set aside the decree and direct a re-hearing on the ground that the Trial Court was wrong in proceeding to decide the suit *ex parte*, the Appellate Court could not accede to that application.

He relied on a decision of this Court in *Parvatishankar Durgashanker* v. *Bai Naval* (1). The defendant in that case had applied for an adjournment on the ground that she was ill and had not been able to file her written statement. The Court granted a month's adjournment. On the appointed day the defendant applied for a further adjournment which the Court rejected and proceeded to hear the case, passing a decree for the plaintiff. The defendant appealed and the District Judge reversing the decree remanded the case for trial, on the ground that the defendant's application for adjournment ought to have been granted. On appeal it was held, discharging the order of remand, that the suit having been tried on the merits, and not on a preliminary point, the District Judge could not remand the case under Section 562, but ought to have proceeded under Sections 568 and 569 of Act XIV of 1882. That decision was dissented from by the High Court of Madras in *Sadhu Krishna Ayyar* v. *Kuppan Ayyangar*. (2) The Full Bench there decided that the Appellate Court can remand a case when it reverses an order refusing to set aside an *ex parte* decree. It seemed to the learned Chief Justice anomalous to hold that there was no such power when the Appellate Court allowed an appeal against a decree upon the ground that there ought not to have been an *ex parte* decree against the defendant.

In *Humni* v. *Aziz-ud-din* (3) the defendants against whom an *ex parte* decree had been passed first filed an application for re-hearing which was rejected. Then they appealed against the decree to the District Judge who dismissed the appeal. In second appeal it was held that the defendants might and should have appealed against the rejection by the Munsif of their application for a re-hearing; but they had no right in their appeal from the decree to raise any question, as to their non-appearance in the Court of first instance. It may be that the fact that the defendants had in the first instance applied for a re-hearing influenced the Court in coming to the conclusion it did. Now the learned District Judge was of opinion that in appeal against the *ex parte* decision under Section 96, Civil Procedure Code, the Appellate court could not deal with the question whether the lower Court was right in proceeding *ex parte*. The only ground on which the decree could be challenged in appeal was that the evidence which the plaintiff had adduced was not sufficient to justify the decree. It seems to me that the question really in this case has been unduly narrowed by considering that the Appellate Court had power to remand the case only if it came within O. XLI, R. 23. If there was no power to remand unless the lower Court had disposed of the suit upon a preliminary point, then undoubtedly the Appellate Court could not have any power to set aside the decree of the lower Court and direct a retrial because in the opinion of the Appellate Court the lower Court was wrong in refusing the adjournment. It appears to me that would be taking a narrow view indeed of the powers of an Appellate Court However limited such powers were by the Code of 1882, there are certain new sections in the Code of 1908 which enable the Judges to take a wider view of their powers and prevent them from being restricted to the particular powers granted by particular Sections. O. XLI, R. 33, gives an appellate Court power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require.

Section 151 of the Code of Civil Procedure gives the Court power to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court. This question with regard to the power of remand of an Appellate Court was dealt with in *Ghuznavi* v. *The Allahabad Bank Ltd.* (4). It was held that the power of remand under Section 107 of the Civil Procedure Code was limited to the case described in O. XLI, R. 23, but nothing in that section restricted in any manner the application of the principle of inherent power recognized by Section 151 of the Code. The learned Chief Justice at page 937 says:—"In my judgment, therefore, the powers of the Appellate Court as

(1) (1892) 17 Bom. 738.
(2) (1906) 30 Mad. 54=16 M.L.J. 479=1 M.L.T. 268.
(3) (1916) 39 All. 143=36 I.C. 277=14 A.L.J. 1226.
(4) (1917) 44 Cal. 929=26 C.L.J. 49=41 I.C. 598=21 C.W.N. 877.

regards remand are not restricted to the case specified in O. XLI, R. 23, but the Court, by reason of its inherent jurisdiction may order a remand in cases other than the case specified in O. XLI, R. 23, if it be necessary for the ends of justice."

This question was also dealt with by the Bombay High Court in *Narottam Rajaram* v. *Mohanlal Kahandas* (5). It was held, setting aside the order of remand that an Appellate Court could remand a case to the trial Court only when the latter had disposed of the suit upon a preliminary point and the decree was reversed on appeal. Section 151 appears to have been referred to in the argument, and I do not think it can be inferred from the judgment that the learned Judges would not have had recourse to that section if they thought that the ends of justice required it. At page 294 Mr. Justice Batchelor says: "As to Section 151, which Mr. Thakor relied upon, we think that it has no relevance to the present argument. It was not, in our opinion, necessary for the ends of justice to withdraw the decision of the case from a Court of higher jurisdiction and to hand it over to a Court of lower jurisdiction."

That decision, therefore, must be read in the light of the particular facts of the case. An order refusing an adjournment may form a ground of appeal at whatever stage of the hearing it may have been made and if the Appellate Court comes to the conclusion that an application for an adjournment had been wrongly refused, it clearly has the power to set aside the decree and order a retrial. If it has not sufficient material before it to decide whether an adjournment should have been granted, it has the power under O. XLI, R. 27, to allow additional evidence to be produced,

If, however, there has been no appearance at all consequently no application for an adjournment has been made, it would be difficult for an Appellate Court to deal with the case except on the merits. If the defendant instead of exercising his right to apply to the Trial Court for the retrial, chooses to appeal, it might well be said that he has no right to ask the Appellate Court to allow him to produce evidence to account for his absence in the Trial Court. Still I should not like to say that in no circumstances could an Appellate Court exercise its discretion in his favour. It appears to me that the Legislature in the present Code intended to free an Appellate Court from the restrictions imposed on it by the Code of 1882 and to give it powers to make such orders as it might think fit that justice might be done.

The Appellate Court in this case certainly expressed an opinion that defendant No. 1, having produced a medical certificate from a Bombay Doctor to the effect that he was laid up with fever for three days from 2nd February 1918, had sufficiently explained his absence. But the plaintiff is still anxious to contest the question in the Appellate Court, so that we must leave that question still open to be decided.

The order dismissing the appeal is set aside and the lower Appellate Court is directed to come to a finding on the question whether the defendant could show sufficient reasons for his absence in the Trial Court on the 5th February 1918. On the finding on that question will it depend whether the Appellate Court should set aside the decree of the Trial Court and direct a new trial or confirm the decree of the lower Court. Costs will be costs in the appeal.

Shah, J.—I concur in the order proposed. I desire to state briefly the reason for the view which I take of the questions of law which have been argued in this appeal.

The first question that arises is whether the Appellate Court has power in an appeal from an *ex parte* decree to deal with the question whether the refusal to adjourn the case on the application of the defendant against whom the suit proceeded was for sufficient reasons or not. In this case the defendant against whom the suit is decided *ex parte* has not availed himself of the remedy provided by the Code by way of an application to set aside the *ex parte* decree under O. IX, R. 13. The question arises with reference to the power of the Appellate Court, when that remedy is not resorted to. The position may be quite different where the party appealing has already

(5) (1912) 37 Bom. 289=17 I.C. 891=14 Bom. L. R. 1154.

availed himself of the remedy by way of an application to set aside the decree and has failed in those proceedings on the merits. But in a case where he has not resorted to that remedy provided by the Code, can he question the correctness of the *ex parte* decree on the ground that the refusal to adjourn the case was not proper?

It seems to me that it is open to him to raise that question in the appeal from the *ex parte* decree. On that point I accept the view of the Full Bench in *Sadhu Krishna Ayyar* v. *Kuppan Ayyangar* (2). Undoubtedly the observations in *Humni* v. *Asiuddin* (3) are against this view. These observations were made with reference to a case in which the party appealing had already exhausted his remedy by way of an application to set aside the *ex parte* decree The observations, however, are perfectly general and, so far as they go, are in favour of the contention urged on behalf of the plaintiffs. But that opinion, if it is to be taken without relation to the facts of the case, is opposed to the decision of the Madras High Court, to which I have already referred.

With due respect, I prefer the opinion of the Madras High Court. That opinion, so far as the power of the Appellate Court is concerned, is in entire consonance with the decision in *Parvatishanker Durgashanker* v. *Bai Naval* (1). That decision relates to the nature of the order which the lower Appellate Court may make; but by necessary implication the decision either accepts or acquiesces in the view that the Appellate Court has the power to consider whether the adjournment was properly refused or not. To that extent, the decision is in accordance with the opinion of the Madras High Court. I am clearly of opinion that the lower Appellate Court had the power to consider the question whether the suit was heard *ex parte* against the appellants on sufficient grounds.

This second question relates entirely to the form of the order which the Appellate Court may make, in case it is satisfied that the grounds for proceeding *ex parte* were not sufficient. That Court may reverse the decree and send back the case to the Trial Court for a re-trial, or may send down issues and call for findings and may direct further evidence to be recorded under O. XLI, Rr. 25 and 27. That of course is, generally speaking, a matter within the discretion of the Court. But it is argued on behalf of the plaintiffs that the Court, has no power to remand except under R. 23.

I do not think, however, that if the Appellate Court is minded under the circumstances of a particular case to reverse the decree of the Trial Court and to remand the suit to that Court for a re-trial, it has no power to do so. It may be that a case may not fall within the scope of R. 23, O. XLI. But the words of R. 33, O. XLI, as also the provisions of Section 151 are wide enough to save the power of the Appellate Court to make an order suited to the circumstances of the case or in the interests of justice, and, if necessary, to remand the suit for a re-trial The decision in *Narottam Rajaram* v. *Mohanlal Kahandas*, (5) which has been relied upon by Mr. Thakor, does not necessarily conflict with this view.

The facts, with reference to which the power of remand by the Appellate Court was considered, were materially different; and while, in that particular case, the remand order made was held to have been beyond the powers of the Appellate Court, that decision cannot be read as laying down a general rule that except under R. 23, O. XLI, there is no power in the Appellate Court to make an order of remand if it considers it proper to do so, or necessary for the ends of justice to do so. The question whether the case should be remanded for re-trial or whether an order under R. 25 of O. XLI, would meet the requirement of the case must be determined by the Appellate Court with reference to the facts of each case.

Order set aside.

A. I. R. 1922 Bombay 271.

MACLEOD, C. J. AND SHAH, J.

Rasul Malik Pinjar—Plaintiff-Appellant.

v.

Amina Hanif—Defendant-Respondent.

S. A. No. 147 of 1921, decided on 16th March 1922 from a decision of District Judge, Belgaum, in App. No. 282 of 1919.

Limitation Act (V of 1908), Arts. 181, 165—Applicability of—Judgment-debtor dispossessed of his properties in execution—His application one month after dispossession, is within Art. 181 and not Art. 165 and is not barred.

The wording of Art. 165 of the limitation schedule makes it absolutely clear that it was intended to apply to an application provided for by O. 21, R. 100 of the Civil P. C. and no other and therefore, where the applicant is a judgment-debtor who has no remedy by a suit, the proper article which applies is Art 181 and not Art. 165. 38 All. 389 and 42 Mad. 753 followed. [P. 273, C. 1.]

R. A. Jahagirdar—for Appellant.

S. R. Parulekar for *D. N. Deshpande*—for Respondents Nos. 1 to 4.

Judgment:—This appeal raises an interesting question of law which has not previously come before this High Court. A partition decree was passed in a suit, and in execution of the decree the plaintiff complained that he had been dispossessed of certain land by the Collector's subordinate officers which was his own property and not subject to partition. He seems to have originally filed a suit to recover possession of the property, but it was decided by the District Court that the plaint should be treated as an application under Section 47 of the Civil Procedure Code, and it was treated so accordingly. The Trial Judge held that Art. 165 of the Limitation Act applied and the application was held barred as not having been filed within 30 days from the date of dispossession. The question seemed so clear to the applicant's adviser, that, as the learned Judge points out, he seems to have admitted that there was no way of getting rid of the application of Art. 165.

In First Appeal this decision was upheld. The learned Judge said:

"Partition was made by the Collector in pursuance of a partition decree, and in pursuance of that partition the present applicant was admittedly dispossessed of certain land which he now claims to be his own exclusive property and therefore not liable to partition. It is admitted that the suit now treated as an application was instituted several months after this dispossession. These facts, I think, are exactly covered by Art. 165. This is an application "under the Civil Procedure Code, 1908, by a person dispossessed of immoveable property and disputing the right of the decree-holder to be put into possession."

It is argued by Mr Majli, the learned pleader for the appellant, that Art. 181 applies to all applications under Section 47. No doubt there are applications under that section to which Art. 181 would apply. But, of course, it can have no application where a period of limitation is provided elsewhere, and in my opinion, 'elsewhere' in the present case is Art. 165."

A similar question came before the High Court of Allahabad in *Abdul Karim* v. *Islam-un-nissa Bibi* (1). The learned Judges said "on appeals being brought by both the decree-holders and the judgment-debtors, the District Judge holding himself, as we think quite properly, bound by certain authorities mentioned hereafter, decided that the judgment-debtor's application was time-barred on the ground that Art. 165 of the Limitation Act applied to it, and that the time of 30 days had run out. We are clearly of opinion that when the matter is closely examined this view is untenable. In a technical matter of this kind, when the language relied upon does not in express terms to cover the case, it is of the highest importance to realize the position of the parties and the context in which the language is used.

Where the interpretation sought to be put upon the works is arrived at by implication and by reference, the Court ought not to adopt a construction which has restricting and penalizing operation unless it is driven to do so by the irresistible force of language. Now in the ordinary course of things a person who is wrongfully dispossessed

(1) (1916) 38 All. 389 = 34 I. C. 231 = 14 A. L. J. 401.

of immoveable property has a remedy by a suit for possession only. In matters raising out of the execution of decrees, possibly because they are the indirect result of the active interference of the Court itself, the Legislature has provided two exceptions. The judgment-debtor must apply to the Court under Section 47. If he is dispossessed of land which is outside the decree, and he does not so apply, he loses his land. He cannot bring a suit. He is worse off than the ordinary person wrongfully dispossessed. On the other hand, if a third person outside the suit is unfortunately the victim of some mistake in the decree itself, or by the decree-holder, he may apply to the Court in a summary manner and if all is right he may be put back into possession. That is expressly provided by O. XXI, Rr. 100 and 101. Such a person is better off than the ordinary person wrongfully dispossessed. He can bring a suit, of course, within twelve years; but he can, if he pleases, apply summarily for possession. That is a privilege of a peculiar and special character, from which the judgment-debtor is excluded in express terms. It is not surprising to find such a privilege accompanied by certain restrictions. By Art. 165 of the Limitation Act of 1908, (the Article now in question) such an application must be made within thirty days. The Article is in these terms:—

"Description of application:—Under the Code of Civil Procedure 1908, by a person dispossessed of immoveable property and disputing the right of the decree-holder, or purchaser at a sale in execution of a decree, to be put into possession. Period of limitation:—Thirty days from the date of dispossession." Now that is a precise and compendious description of the right given, and the application allowed to "a person other than the judgment-debtor" by O. XXI, Rr. 100 and 101. It certainly applies to such an application and there is no other provision in the Code which in the terms it employs at all corresponds to it. We think it quite certain that when the Legislature enacted Art. 165, it had the provisions now contained in O. XXI, Rr. 100 and 101 in mind. That is to say, it intended Art. 165 to apply to such an application. The argument for the view adopted in the reported cases, and followed by the District Judge in the case, is that the words are wide enough to include a judgment-debtor separated from their context and this is true. A judgment-debtor is a "person" in such a case as this. Moreover, the judgment-debtor in his application under Section 47 is complaining of the same sort of act as an applicant under O. XXI, R. 100, would have to complain of. But the moment it is realized that what the schedule to the Limitation Act consists of, is an enumeration of suits, appeals and applications of various kinds, and that the language of Art. 165 is merely a definition or description, all difficulty as to the use of the word "person" disappears. In our opinion the word "person" in that context, although wide enough to include a debtor, was never used in any other sense than that of a person who is authorized by O. XXI, R. 100, to make an application of that description. To hold otherwise would result in this, that if a judgment-debtor applied to the Court under O. XXI, R. 100, and adopted the language of Art. 165, his application would have to be dismissed because he is precluded from making an application of that description, and yet if he postpones applying under Section 47 for more than thirty days, the language of the article is to be applied to him.

The learned Judges then referred to *Ratnam Ayyar* v. *Krishna Doss Vithal Doss* (2) and *Har Dit Singh* v. *Lachman Singh* (3) in which cases it was held that Art. 165 would apply, and eventually they differed from those decisions.

The case of *Ratnam Ayyar* v. *Krishna Doss Vithal Doss* (2) was considered by a Full Bench of the Madras High Court in *Vachali Rohini* v. *Puthalathun Kandi Kombi Aliassan* (4) and in overruling the decision the Chief Justice traced the history of Arts. 165 and 168 of the Limitation Act of 1908. The Chief Justice said "The legislature has, however, itself restricted the scope of Art. 165 by restricting in the Code of 1908 applications by third parties under O. XXI, R. 100, to applications with reference to property recovered by the decree or sale in pursuance thereof, and

(2) (1898) 21 Mad. 494=8 M. L. J. 75.
(3) (1903) 25 All. 343=1903 A. W. N. 59.
(4) (1919) 42 Mad. 753=10 L. W 410=(1919) M. W. N. 782=87 M. L J. 340 (F. B.)

the fact that this procedure is not now applicable to complaints by third parties, of dispossession of property not covered by such decree or sale appears to me to afford additional reason for excluding from the scope of the article similar complaints by defendants who, as I am satisfied, were never intended to be covered by it. I think, moreover, that the rights of defendants are sufficiently restricted by their being required to apply under Section 47 within the period limited by Article 181."

This question, therefore, having been considered recently by the High Courts of Allahabad and Madras, we should have to show very clear grounds for differing from those decisions. For myself, I see no reason why Article 165 should apply to judgment-debtors so as to very seriously restrict their rights when dispossessed of property which they allege had not come within the terms of the decree which is being executed. Ordinarily they would apply under Section 47, and would have a period of limitation for such an application of three years under Article 181.

As pointed out by the learned Judges in *Abdul Karim* v. *Islamun Nissa Bibi* (1) a person other than the judgment-debtor is not restricted to making an application under Order XXI, rule 100, which is merely a summary remedy, and that his rights to a suit remain the same. The judgment-debtor on the other hand has no remedy by suit.

I agree that the wording of Article 165 makes it absolutely clear that it was intended to apply to an application provided for by Order XXI, rule 100 and no other, and that therefore where the applicant is a judgment-debtor, the proper Article which applies to his application is Article 181. I think, therefore, that the appeal should be allowed and the Darkhast directed to proceed according to law. The appellant should get his costs of the appeal.

Shah, J.—The point arising in this appeal is not free from difficulty; but on the whole I think that the view taken by the Allahabad High Court in *Abdul Karim* v. *Islamun-Nisa Bibi*, (1) and by the Madras High Court in *Vaskali Rohini* v. *Kombi Aliassan*, (4) is to be preferred to the view taken by those Courts in the earlier decisions referred to in those cases. On the wording of the Article no doubt it may appear as if it would apply also to the case of a judgment-debtor dispossessed of immoveable property; and it is urged on behalf of the respondent before us that Article 166 which follows Article 165 has been interpreted as governing the case of an application by a judgment-debtor, to set aside a sale in execution of a decree.

It is clear that the considerations applicable to Article 166 are different. And we are not concerned in this appeal with the scope of Article 166. I do not desire to suggest for a moment that Article 166 would not apply to the case of an application by a judgment-debtor to set aside a sale in execution of a decree. But the wording of Article 165 is somewhat different and is capable of being read in a restricted sense, in which it has been read by the Allahabad and Madras High Courts in the cases to which I have already referred.

I think that that is the view which we should give effect to in this appeal.

Appeal allowed.

A. I. R. 1922 Bombay 273

MACLEOD, C. J.

Jafferji Ibrahimji—Plaintiff

v.

Miyadin Mangal—Defendant

O. S. J. Suit No. 1427 of 1920 decided on 1st October, 1921.

(a) Civil P. C., O. XXI, Rr. 97, 99, O. I, R. 7—Ejectment decree against lessee—Execution—Sub-tenants cannot resist delivery of possession—Bombay Rent (War Restrictions) Act 1918.

An owner of premises suing for possession may find it advantageous to join all the persons in possession of the suit premises, to avoid difficulties which may otherwise arise when he attempts to execute his decree, but the non-joinder will not enable a sub-tenant to resist delivery of possession to the owner in execution of his decree for ejectment against his lessee. [P. 274, C. 1 & 2]

(b) *Bombay Rent (War Restrictions) Act—Sub-tenants have no greater right than the tenant as against Landlord.*

There is nothing in the Bombay Rent Act to protect sub-tenants from ejectment by the landlord of the premises, with whom there was no privity of contract. [P. 274, Col. 2]

Jinnah—for Plaintiff.

Setalvad—for Claimants.

Judgment.—This is an application by the plaintiff for an order that certain persons should vacate the premises, the subject-matter of Suit No 1427 of 1920 filed against the lessee, in which a decree was passed by consent that the defendant should vacate the premises and deliver up peaceful possession to the plaintiff on or before the 31st December 1920. When the plaintiff sought to execute his decree, he was obstructed by the present opponents and accordingly he had to make an application under Order XXI, rule 97. Under rule 99 where the Court is satisfied that resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court will make an order dismissing the application.

In this case the opponents do not say that they are in possession of the suit property on their own account or on account of some person other than the judgment-debtor. They have to admit that they are tenants of the judgment-debtor. The question whether they are servants or agents of the judgment-debtor and not tenants, is not really relevant to the question at issue, because in either case they are not entitled to obstruct the decree-holder.

The opponents apparently place some reliance on the Bombay Rent (War Restrictions) Act. But although they may be tenants with regard to their immediate lessor and so entitled to protection against him, there is nothing in the Act to protect them against the landlord of the premises, with whom there was no privity of contract.

It seems to me that this conclusion must be obvious. Otherwise when his tenant has sub-let the premises, a landlord would either have to make every sub-tenant a party to his suit against his tenant or, if he omitted to do that, he might have to file suits against all the sub-tenants after he had obtained a decree against his tenant. That certainly was not intended by the Act.

No doubt a plaintiff suing for possession may find it advantageous to join all the persons in possession of the suit premises, to avoid difficulties which may otherwise arise when he attempts to execute his decree, but there is nothing in the Bombay Rent (War Restrictions) Act which gives persons in possession through the tenants a better right to obstruct the execution of the decree than they had, apart from the Act.

The summons must be made absolute with costs.

Counsel certified.

Summons made absolute.

A. I. R. 1922 Bombay 274.

MACLEOD, C. J. AND SHAH, J.

Nathuram Hiraram Thakor and others —Plaintiffs-Appellants

v.

Secretary of State for India and another —Defendants-Respondents.

F. A. No. 191 of 1919 decided on 23rd December 1921 from a decision of District Judge, Ahmedabad, in suit No. 34 of 1915.

(a) *Bombay Land Revenue Code (1879), Sections 203, 204—Land held free of rent—Notice of demand to pay assessment by Mamlatdar is not an 'order'.*

Notice of demand to pay assessment by the Mamlatdar cannot be treated as an order or decision within the meaning of Ss. 203 and 204. [P. 276, C. 1.]

(b) *Bombay Revenue Jurisdiction Act (1876), S. 11—Notice of demand by Mamlatdar—Suit for declaration of rent-free rights is not barred by failure to appeal against the notice.*

Where the plaintiffs held their land free of rent, and they were all of a sudden served by the Mamlatdar with a notice of demand to pay assessment and the plaintiffs filed a suit for a declaration that they were entitled to hold their land rent free ;—

Held: The suit is not barred under Section 11. [P. 275, C. 2]

G. N. Thakore—for Appellants.

S. S. Patkar—for Respondent No. 1.

N. K. Mehta—for Respondent No. 2.

Macleod, C.J.—The plaintiffs filed this suit praying for a declaration that Survey No. 656 in the limits of the Talukdari village of Kanj was of their absolute ownership, and that the Talukdar defendants had no right of any kind whatever over it, and that the first defendant, the Secretary of State, had no right of any kind whatever to sanction the relinquishment of the said Survey Number by the said Talukdars, and had no right to assess any kind of claim or tax on it, and for further and other relief.

A preliminary issue was raised whether the suit was barred under Section 11 of the Bombay Revenue Jurisdiction Act. The learned Judge held that the suit was barred on the ground that an order had been passed within the meaning of Ss. 203 and 204 of the Bombay Land Revenue Code, and that as the plaintiffs had not appealed against that order their suit could not lie.

Now it appears, that in the previous litigation between the Talukdars and the plaintiffs, the plaintiffs were able to establish their right to hold this particular land, rent free. Thereafter, the Talukdars relinquished this particular survey number in favour of Government, although it does not appear that the plaintiffs were heard on the question whether the relinquishment was or was not subject to their rights.

The next step taken by the Revenue Authorities was a notice of demand issued by the Mamlatdar that a certain amount was due for the payment of the land revenue, and that if it was not paid within ten days from the receipt of the notice, steps would be taken according to law to forcibly recover the whole amount for the current year's land revenue which had not been paid.

One would presume that the notice of demand of the Mamlatdar was based on an order by the Collector directing that this particular Survey Number was liable to pay assessment, and that evidently was the view taken by the first defendant when the written statement was filed, because in the first paragraph thereof it is said:

> The jurisdiction of the Court to entertain the suit is barred by Section 11 of the Bombay Revenue Jurisdiction Act 1876, since the plaint does not state that the plaintiffs have preferred any appeals against the orders of the Collector imposing and levying assessment on the land in suit as provided by Ss. 203 and 204 of the Bombay Land Revenue Code."

Now it is admitted that no such order of the Collector can be produced. Consequently there could be no order from which an appeal lay. It seems that the first defendant urged that in the absence of the order of the Collector assessing the land, the notice of demand by the Mamlatdar was an order within the meaning of Ss. 203 and 204.

Now the plaintiffs could have appealed to a higher authority objecting to the notice of demand issued by the Mamlatdar, but it does not follow that because they could have endeavoured by a resort to higher authority to get that notice of demand revoked, therefore, it was an order within the meaning of Ss. 203 and 204 of the Bombay Land Revenue Code. The learned Judge on this question says:

> "Then it was contended that the notice of demand issued by the Mamlatdar was not an 'order'. Considering the number of years for which the dispute about these lands has been continuing, one would suppose that before the Mamlatdar issued this notice there must have been a formal order by some Revenue Officer directing this to be done. But if there was such an order it has not been brought to the notice of the Court, and the learned pleader for the defendants, in arguing the issue, treats the demand notice as if it was the order and nothing else. In my opinion it is an order within the meaning of Ss. 203 and 204 of the Land Revenue Code. I see no reason to hold that the word "order" used in those sections was meant to be understood in a narrow or technical sense, as a formal order passed after judicial inquiry or anything of that kind. A notice of demand is in effect an order to pay:"

Now it may be said that a notice of demand which, if not complied with, can be made effective by execution proceedings, may be considered as akin to an order, but that could only be because of the results following from it. But it is not strictly logical to find that because the

same results follow from two particular kind of documents, therefore the documents are of the same kind also. One has to look to the wording of the document; and it appears to us that it would be going too far to say that this notice of demand, which admittedly is the natural consequence of an order imposing assessment upon land, can be treated as an order or decision within the meaning of Sections 203 and 204 of the Bombay Land Revenue Code.

The whole question regarding this demand of land revenue is somewhat involved in mystery, as the plaintiffs were allowed to continue to hold the land rent free, and yet apparently no opportunity was given to them, after the demand to pay land assessment was issued, to state their case for their being allowed to continue to hold rent free, whether the land was relinquished or not. It seems to us this is a case to which Section 11 of the Bombay Revenue Jurisdiction Act does not apply, and that the suit would lie.

The decree dismissing the suit must be set aside, and the suit must be remanded to the lower Court to be heard on its merits. The plaintiffs to get their costs of the appeal. Costs in the lower Court to be costs in the cause.

Decree set aside and Suit remanded.

A. I. R. 1922 Bombay 276.

MACLEOD, C. J. AND SHAH, J.

Senaji Kapurchand and others—Defendants-Appellants.

v.

Pannaji Devichand—Plaintiff-Respondent.

App. Nos. 23 and 26 of 1920, decided on 14th September, 1921, from the appellate orders of 1st Class Sub-Judge, Dharwar, in Suit No. 46 of 1919.

(a) *Civil P. C., S. 10—Stay of Suit—Does not prevent passing of interlocutory orders.*

An order staying a suit under section 10 does not prevent a Court from making interlocutory orders, such as orders for a Receiver or an injunction or an order for attachment before judgment. [P. 276, C. 2.]

(b) *Civil P.C., O. 38, R. 5—Grounds for order—Vague allegations are insufficient.*

An order under R. 5, O. 38 should not be passed, unless the Court is satisfied that the defendant, with intent to obstruct or delay the execution of decree that may be passed against him, has brought himself within the terms of the rule; and it is not sufficient that there are merely vague allegations that the defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. [P. 276, C. 2.]

Coyajee and *G. S. Rao*—for Appellant, Defendant No. 1.

P. B. Shingne—for Appellant, Defendant No. 2.

Desai and *G. N. Thakor* and *R. A. Jahagirdhar*—for Respondent.

Judgment:—These appeals are from two orders made by the First Class Subordinate Judge of Dharwar in applications by the plaintiff for attachment before judgment against the three defendants. The appellants are the first defendant and the second defendant.

The first point taken was that as an order has been made under Section 10 of the Civil Procedure Code staying the suit owing to the pendency of another suit between the same parties in the Court at Bellary, therefore, no interlocutory order could be made in this suit. But under Section 10 it is provided that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. That does not prevent the Court from making interlocutory orders, such as orders for a Receiver, or an injunction, or, as in this case, an order for attachment before judgment.

But on the merits it is perfectly clear that there were no grounds in this case for making an order under Order XXXVIII, rule 5. We have often had to point out that under rule 5 the Court must be satisfied that the defendant, with intent to obstruct or delay the execution of the decree that may be passed against him, has brought himself within the terms of the rule; and it is not sufficient that there are merely vague allegations that the defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. In this

case it is alleged against the first defendant that he was about to recover the dues of his shop as soon as possible and to remove the articles in the shop.

It is also alleged against the second defendant that he was closing two shops, one at Bellary and the other at Adoni dealing in yarn and Shroff business But of the two shops the shop at Adoni which had dealings to the extent of two or three lacs, was closed about the last Divali holidays. As the property in the said shop had been disposed of, nothing was left there. Besides this, the partnership shop at Bellary, which had dealings to the extent of two to three lacs, had almost closed its business and had dwindled into a very petty concern.

On these allegations the Court should certainly have asked for further evidence before making an *ex parte* order calling upon the defendants to furnish security. The defendants appellants thereafter produced ample evidence before the Court that they were substantial merchants, and were not about to dispose of their property with intent to obstruct or delay the execution of any decree that the plaintiff might obtain against them, while there was no evidence produced by the plaintiff to support the allegations which he made in March 1920, so that the original order ought to have been discharged instead of the attachment being confirmed. The Judge says:

"As regards defendant No. 1, Exhibits 32 to 37 prove the general reputation of defendant No. 1's firm and nobody has a word to say against it. We want evidence as to what is going on recently there. On this point none of the deponents in Exhibits 32 to 37 can enlighten us. For none of them say, if they themselves attended defendant No. 1's shop at Bellary, and if so, when was it last? For all these reasons, I am satisfied that the application in Exhibit 25 A was granted on good grounds."

But as we have already observed, when considering Exhibit 25 A, it is quite clear, it afforded no ground whatever for issuing the order against the appellants. The appeals, therefore, must be allowed, the attachment before judgment removed and the security discharged.

The appellants must get their costs of the proceedings in this Court and in the Court below. *Appeals allowed*

A.I.R. 1922 Bombay 277

MACLEOD, C.J. AND SHAH, J.

Bhimrao Nagojirao Patankar—Plaintiff—Appellant,

v.

Sakharam Sabaji Kantak and others—Defendants-Respondents.

S. A. No. 644 of 1920 decided on 23rd August 1921 from the decision of Assistant Judge, Satara in A. No. 425 of 1918.

T.P. Act, S. 60—Clog on equity of redemption. —Permanent lease to mortgagee will operate as a clog.

Plaintiff executed a permanent lease of land belonging to him in favour of the defendant. The same day he mortgaged the land to the defendant. In plaintiff's suit to redeem and recover the land.

Held: the two documents were parts of the same transaction and their real effect was that the mortgagee got the land as security for the loan, and at the same time obtained a contract from the mortgagor that he should be a permanent tenant of the land. The contract constituted a clog on the equity of redemption (1904) A.C. 323; 73 L.J. Ch. 526; referred to.

[P. 278, Col. 1.]

Nilkanth Atmaram—for Appellant.

A.G. Desai—for Respondent, Nos. 1 to 3.

Judgment:—The plaintiff sued to redeem and recover possession of the plaint land, which was mortgaged by his grandfather to the defendants' ancestor by a mortgage, dated 17th March 1859. The plaintiff admits that at the same time as the mortgage, another document was executed, purporting to lease the land to the mortgagee on a permanent tenure on condition that the lessee paid a fixed rent of Rs. 70. The defendant pleaded that he was a mortgagee not of the land in suit, but merely of the fixed rent payable to plaintiff as his landlord, he being Mirasdar of the land of long standing.

Both the lower courts have decided on that point in favour of the defendant and have passed a preliminary decree to the effect that if the plaintiff pays into Court Rs. 1,501 within six months from the date of the decree, the plaintiff should be entitled to claim payment of

the annual rent of Rs. 70 year by year from the defendant.

The question is what is the true effect to be given to the documents, Exhibits 45 and 46, which were executed at the same time on the 17th March 1859. No doubt if we look merely at what is stated in those documents, the mortgagor first purported to lease to the mortgagee the suit land at an annual rent of Rs. 70 on Mirasi tenure. Then by Exhibit 46 he purported to mortgage, not the land, but the annual rent which was secured by Exhibit 45.

Before these documents were executed, the mortgagor was the owner of the land and as we read the documents, their real effect was that the mortgagee got the land as security for the loan, and at the same time obtained a contract from the mortgagor that he, the mortgagee, should be a permanent tenant of the land paying an yearly rent of Rs. 70. The mortgagee, therefore, obtained a contract whereby the mortgagor lost the right to get back his property on repaying the loan, so that it must be admitted that, that contract constituted a clog on the equity of redemption. If the mortgagee had got a contract for the sale of the land, undoubtedly a Court of Equity would not allow him to take advantage of that contract [see *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (1)]

It seems to us there is very little difference between a contract by the mortgagee to buy the mortgaged premises out and out for a consideration, and a contract by a mortgagee to take the premises on a permanent tenure at a fixed rent which in effect makes him the owner of the premises, the consideration being satisfied by deferred payments.

It has been strenuously argued that what is mortgaged is not the suit land but merely the right to recover the rent secured by the permanent lease. But we do not think that the Court will be so blind to the real effect of these documents, Exhibits 45 and 46, that it should refuse to apply the principle of equity which, as has been pointed out by Lord Halsbury in the case we have referred to, has been applied by the Courts for certainly more than a century. The learned Appellate Judge, in refusing to apply this principle of equity, says:

"The lease and the mortgage were not treated as parts of the same arrangement. In the words of Lord Halsbury quoted above, "if a day had intervened between the two parts of the arrangement, the part of the bargain (impeached as a clog) would have been perfectly good and capable of being enforced." If so, I do not see why it should fail if the period intervening be a few minutes instead of a day."

If that argument were to prevail, then the principle of equity could never be applied at all. It is the plain fact that these two documents were parts of the same transaction, which enables us to apply the principle of equity, and we need not consider what our decision would have been if the lease had been executed a day or two previously to the mortgage.

In our opinion, therefore, the appeal must succeed, and the plaintiff must be held entitled to redeem.

We pass a preliminary decree to the effect that if the plaintiff pays into Court Rs. 1,501 within six months from the date these proceedings reach the lower Court, he will be entitled to ask the Court to pass a final decree for possession. No order as to costs throughout.

Appeal allowed.

(1) (1904) A.C. 323=73 L J. Ch. 526=90 L. T. 731=11 Manson 276=20 T L.R. 536=52 W.R. 673.

A.I.R. 1922 Bombay 278.

MACLEOD, C. J. AND SHAH, J.

Keshav Lal Maganlal Trivedi—Appellant

v.

Ambalal Veniram and others—Respondents.

F. A. No. 318 of 1920 decided on 30th August, 1921 from a decision of the D. J. Ahmedabad, in Mis. App. No. 45 of 1920.

Guardians and Wards Act (1890), S. 8—Minor in custody of father—Stranger cannot be appointed guardian on the ground that child was going to be married at age of 4 years.

Any friend of a minor may approach the Court in the case of the minor being ill-treated and invoke the protection of the Court on behalf of the minor. But it is another question altogether if an outsider invokes the protection of the Court for a minor who is in the lawful custody of her father, unless the applicant can satisfy the Court that it is for the welfare of the minor that an order should be made against the father. Where a stranger, the spiritual head of the community made an application to deprive the father of the custody and the natural guardianship of the minor girl, on the ground that she was about to be married at the early age of four which would expose her to the risk of premature widowhood, and that the father was about to sacrifice his daughter's interests by resorting to the practice of *Sata* marriages with a view to secure a bride for himself,

Held: General considerations of that character, which are not opposed to the practice of the community to which the parties belong, cannot be ordinarily accepted as a sufficient ground for depriving the father of such rights as he has to look after the welfare of his minor children. [P. 279, Col. 1, 2.]

G. N. Thakor—for Appellant.

Y. N. Nadkarni—for Respondent No. 1.

Macleod, C. J.—This was an application under the Guardians and Wards Act by the Kulmukhtyar of the Shankaracharya of the Sharadapith. Dakore, purporting to be the spiritual head of the community to which the opponents belonged. The occasion of the application was the approaching marriage of the girl for whom it was sought to get a guardian appointed.

In the petition the Kulmukhtyar said: "The opponent No. 1 the father of the girl, is unfit to be the guardian of the person of the minor for the reasons stated in paragraph 2," that is to say, because he was going to marry the minor girl who was only four years' old, and thus sacrifice her in order to get a wife for himself and because the petitioner apprehended that the minor girl might be left a widow at an early age. The Kulmukhtyar, therefore, prayed that the Court should give him the custody of the minor and appoint him guardian of the person and of the property of the minor.

Now, it may be conceded that any friend of a minor may approach the Court in the case of the minor being ill-treated, and invoke the protection of the Court on behalf of the minor. But it is another question altogether if an outsider invokes the protection of the Court for a minor who is in the lawful custody of her father, unless the applicant can satisfy the Court that it is for the welfare of the minor that an order should be made against the father. The reason here for asking the Court to interfere is that the father is marrying his daughter at the age of four, which would leave her to the risk of becoming a widow during infancy. As the learned Judge remarks, such a marriage would be in conformity with the rules of the caste and the practices prevailing in the community, to which the father belongs.

However shocking an idea it may seem to other minds that an infant child should go through the ceremony of a marriage in a community which does not permit widow re-marriage, still it is not for this Court to enter into considerations of that kind. Whatever our own opinion may be, we have to consider in every case, which comes before us, the rules of the castes and the practices which prevail in the particular community to which the parties belong. It would certainly be far more unjust and injurious if we were to set up our own opinions and enforce upon the parties the manner and customs which we consider they should conform to rather than those amongst which they have been brought up.

The Judge was perfectly right in the conclusion which he came to. The appeal must be dismissed with costs.

Shah, J.—I agree. The appellant in this case sought in the District Court, by an application under the Guardians and Wards Act, to deprive the father of the custody and the natural guardianship of the minor girl, on the ground that she was about to be married at the early age of four which would expose her to the risk of premature widowhood, and that the father was about to sacrifice his daughter's interests by resorting to the practice of *Sata* marriages with a view to secure a bride for himself.

I do not think that general considerations of that character, which are not opposed to the practice of the community to which the parties belong, can be ordinarily accepted as a sufficient ground for depriving the father of such rights as he has, to look after the welfare of his minor children. The lower Court, it seems to me, was

perfectly right in not entertaining this application on the grounds disclosed in the application. I do not say that a person in the position of the present applicant cannot come forward as a friend of the minor to seek the protection of the Court for the minor. It must depend upon the facts and circumstances of a particular case. But in the present case the grounds alleged are based more or less upon broad considerations concerning the practice and custom in a particular community; and it seems to me that it would be very unsafe to accept them as justifying an interference with the right of the father to the custody and guardianship of his minor daughter.

The Court should require very clear and strong grounds to hold that it is for the welfare of the minor girl that she should be separated from her father and left under the care of a stranger.

Appeal dismissed

A. I. R. 1922 Bombay 280.

MACLEOD, C. J. AND COYAJEE, J.

Mohanlal Amrit Lal and another—Plaintiffs-Appellants.

v.

Bai Mahajaveri—Respondent.

S. A. No. 299 of 1921 decided on 14th February 1922 from the District Judge, Broach, in Mis. A. No. 13 of 1919.

Judicial Order—Ex-parte order—*Application to set aside—Must be considered on merits.*

When a widow of one of the decree-holders got her name recorded in place of her husband without notice to other decree-holders and when the other decree-holders applied to be heard as to whether the order was wrong.

Held: that the Court is bound to decide whether the *ex-parte* order was correct.

[P. 280, C. 2.]

H. V. Divatia—for Appellants.

P. B. Shingne—for Respondent.

Judgment:—This is an appeal from the decision of the District Judge of Broach in execution proceedings with regard to a decree in Regular Civil Suit No. 34 of 1915. The original decree-holders were Mohanlal and Maneklal and the two sons of their deceased brother Dahyabbai. After the decree Maneklal died, and then his widow put in an application in which she prayed that she should be brought on the record as the legal representative of her deceased husband. She was asked to produce a succession certificate which she did. Accordingly on the 30th October 1919 her prayer was granted, but no notice of her application was given to the other decree-holders. On the 4th November they asked that the *ex-parte* order made in favour of Maneklal's widow should be vacated On that the following order was made by the Subordinate Judge. "Rejected in view of the previous order on the Darkhast.

That was a wrong way of dealing with that application. As the order in favour of the widow was made *ex-parte*, it was open to the decree-holders to ask the Court to re-consider its decision, and the fact that the previous order had been made on the widow's application, would not prevent the Court from considering it when the other decree-holders objected.

From the order of the 10th November rejecting the decree-holders' application, an appeal was filed to the District Judge. A preliminary objection was taken that no appeal lay, and unfortunately it seems to have been admitted by the appellants' pleader that he ought to have appealed against the order of the 30th October, and not against the order passed not on the 10th November.

No question of limitation arose because the appeal was filed within 30 days of the order of the 30th October. But it made no difference in effect whether the appellants appealed against the *ex-parte* order made in favour of the widow on the 30th October, or the order passed against the decree-holders on the 10th November refusing to consider their application to set aside the *ex parte* order. The fact remains that an order was made *ex-parte* in favour of the widow, and the appellants are entitled to have that considered on the merits.

Therefore we must allow the appeal and send the case back to the trial Judge so that he may consider whether the appellants' application to vacate the order of the 30th October should be granted or not. The appellants to have their costs of this appeal and of the appeal in the Court below.

Appeal allowed.

A.I R. 1922 Bombay 281

FAWCETT, J.

Ramnath Dwarkanath Waiwoode—Plaintiff.

v.

Ramrao Balkrishna Dhotre—Defendant.

O. C. J. Suit No. 1308 of 1921 decided on 15th July 1921.

Civil P. C. (1908), O. I, R. 1. and O. 7, R 4 —Joint family—Suit by manager on promissory note—Other members not necessary parties.

Where Plaintiff was the manager of the undivided family and sued on a promissory note passed in his name by the defendant and the adult co-parceners were not made parties to the suit

Held that the other members were not necessary parties and that the suit was not bad for non-joinder. (33 All. 272) and A I. R. 1914 P.C. 136 followed.

The Privy Council decisions do affect the various rulings of Bombay High Court which go to the extent of saying that in every case where a contract is entered into on behalf of a joint family by a co-parcener, he cannot sue alone, but must join the other co-parceners as parties to the suit. [P. 283, C. 2.]

M. V. Desai—for Plaintiff.

S. S. Rangnekar—for Defendant.

Fawcett, J :—The plaintiff sues to recover the amount due on a promissory note for Rs. 2,600 passed in his favour by the defendant on the 16th of April 1920. He claims the sum of Rs. 2,390 together with interest thereon at nine per cent.

The defendant in his written statement sets up various objections to the suit, and the substantial ones are embodied in the following issues :—

(1) Whether the plaintiff can sue on the promissory note without making his brothers parties to the suit ?

(2) Whether in any event he can sue without obtaining Letters of Administration to the estate of his father ?

(3) Whether at the date of the promissory note the plaintiff was the manager of the joint Hindu family ?

(4) Whether there was a subsequent oral agreement as alleged in para. 4 of the written statement ?

(5) If so, whether the suit is not premature except as to Rs. 100 ?

(After considering the evidence the learned Judge answered issues Nos. (2) and (3) in the affirmative and (4) and (5) in the negative and proceeded as follows) :—

There only remains the first issue which is the really substantial one raised, *viz.*, whether the plaintiff can sue on the note without making his brothers parties to the suit.

In support of his contention Mr. Rangnekar relied on the case of *Naranji Vasanji* v. *Moti Govanji* (1) and various other similar rulings of this Court. That case follows the one of *Kalidas Kevaldas* v. *Nathu Bhagvan* (2) which in turn is based on the rule of English law that enables the defendant to insist on all the contractees being made co-plaintiffs when there is a joint cause of action. In this it follows *Ramsebuk* v. *Ramlall Koondoo* (3) which lays down that, when a joint family carries on a trade in partnership and contracts with the outside public, they have no greater privileges than other traders if they are really partners, they must be bound by the same rules of law for enforcing their contracts in Courts of law as any other partnership.

This case was remarked upon by their Lordships of the Privy Council in *Kishan Prasad* v. *Har Narain Singh* (4). They point out that in that case there were other members of the family who had an equal family interest in the profits of the business, but it was nowhere contended that those members were necessary parties, and they also lay emphasis on the remarks of Garth, C J., which referred to the necessity of defendants being sued by all the partners or persons with whom they had made their contract. The ruling should, therefore, be confined to cases whether the facts show that the actual contract is with particular partners or members of the family.

The case of *Kishan Prasad* v. *Har Narain Singh* (4) certainly affects the various rulings of this Court which went to the extent of saying that, in every case where a contract is entered into on behalf of a joint family by a co-parcener, he cannot sue alone, but must join the other co-parceners as parties; for the Privy Council held that at any rate the manager of a joint family business may enter into contracts in his own name and may sue

(1) (1907) 9 Bom. L. R. 1126.
(2) (1883) 7 Bom. 217
(3) (1881) 6 Cal. 815=8 C L R 457
(4) (1901) 33 All. 272=9 I. C. 789=38 I. A 45 (P. C).

on such contracts without joining the other members of the family as plaintiffs. No doubt the Bombay decisions except a case like that in *Jagabhai Lallubhai* v. *Rustamji Nasarwanji* (5) where the contract had been entered into by a co-parcener in his own name and he did not disclose to the defendant at the time of the contract that he was acting on behalf of the family But that seems to have been the only exception which they permit from the general rule laid down; and this exception does not cover the present case because the plaintiff himself admits that, when the promissory note in suit was passed, defendant understood he was taking the promissory note as manager of the joint family. The defendant also corroborates this. Coming back to the effect of the Privy Council decision in *Kishan Prasad's case* (4), it is to be remarked that two different views have been taken about it.

In *Ramachandra Narayan* v. *Shripatrao* (6), the judgment limits the decision to the case of managing members of the joint family entrusted with the management of a family business. On the other hand, the Madras High Court in *Sheik Ibrahim Tharagan* v. *Rama Aiyar* (7) have taken a different view. There it is pointed out that:—

"In fact, the Privy Council had, even previously to their decision in the above case, practically upheld the right of the managing member to represent the family in litigation. A long line of cases beginning with *Girdharee Lall* v. *Kantoo Lall* (8) established the right of a creditor of a Hindu family to proceed against the father or other managing member of the family alone and to effectively bind the whole family property, including the shares of those not actually parties to the litigation."

The latter ruling is followed in this Presidency. cf. *Ramkrishna* v. *Vinayak Narayan* (9). In *Hori Lal* v. *Nimman Kunwar* (10) at pp. 564 and 565 Tudball, J. points out:—

"Now the general rule of Hindu Law is that a joint family is represented by its manager in all its transactions or concerns with the outer world, provided they are for family necessity . . [and that] he can give a valid discharge without the concurrence of the minor members of the family."

He goes on:—

"It is difficult to see, therefore, why a manager, if he can represent the family in its transactions and concerns with the outer world, should not be also able to represent the family in its litigations in the Courts."

And similarly, if in the case of a creditor suing on a mortgage the manager may sufficiently represent the other adult members of the joint Hindu family, it is difficult to see why a manager should not be permitted to sue alone if he sufficiently represents the rest of the family. In fact it seems to me that the Privy Council in *Sheo Shankar Ram* v. *Juddo Kunwar* (11) has practically given effect to this view. Their Lordships at p. 386 say:—

"There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound. It is quite clear from the facts of this case and the findings of the courts upon them that this is a case where this principle ought to be applied."

And this was done in spite of the provisions of Section 85 of the Transfer of Property Act, now reproduced in Order XXXIV, Rule 1, Civil Procedure Code, under which all persons who have an interest in the property in suit should be joined as parties. If a foreclosure action is one where this principle can be applied, I cannot see why the present suit should not also be a case where it can be equally applied.

Supposing the defendant had executed a mortgage of his immoveable property as security for the loan and owing to defendant's default the plaintiff could bring a foreclosure action, then if the circumstances were such as to make the plaintiff, as manager of the joint family, an effective representative of all the other members

(5) (1885) 9 Bom. 311.
(6) (1915) 40 Bom. 248=33 I. C. 771=18 Bom. L. R. 33.
(7) (1911) 35 Mad. 685=21 M. L. J. 508=10 I. C. 874=(1911) 1 M. W. N. 442.
(8) (1874) 22 W. R. 56=1 I. A. 321=3 Sar. 380.
(9) (1910) 34 Bom. 354=6 I. C. 967=12 Bom. L. R. 219.
(10) (1912) 34 All. 549=15 I. C. 126=9 A.L. J. 819.
(11) A. I. R. (1914) P. C. 136=36 All. 338 =41 I. A. 216.

of the family so that the whole of the family would be bound, then clearly, in the view taken by their Lordships, he could sue alone.

Why, therefore, should he not sue alone in this case, where the only difference is that such a mortgage has not been executed? I think *Sheo Shankar's case* (11) affords clear authority for saying that the facts of the particular case must be looked at in order to see whether it is proper for the manager to be allowed to sue alone as sufficiently representing all the other members of the family; and that in view of this decision of the Privy Council, even accepting the restricted view of the effect of the decision in *Kishan Prasad's case* (4) which is, taken in *Ramachandra Narayan v. Shripatrao* (6), the previous Bombay decisions, which support Mr. Rangnekar's contention, require reconsideration and are not now really binding.

Thus in *Lalji Nensey* v. *Keshowji Punja* (12) it has been held that at any rate minors are unnecessary parties, though the decision in: *Naranji Vasanji* v. *Moti Govanji* (1) went to the extent of requiring their being joined. Now, in this particular case, the facts are that the defendant has consistently been satisfied with the signature of plaintiff's father for his numerous payments, and since Dwarkanath's death, has been satisfied with the signature of the plaintiff, although he was quite aware that the moneys were joint family moneys and that this was a joint Hindu family. He also executed the two promissory notes in favour of Dwarkanath personally and plaintiff personally. He has himself frankly admitted that he has no objection to pay the plaintiff alone as the manager of the family, but pleads that he cannot pay the whole sum at once.

The contention, that the other co-parceners should be joined in this suit is purely one raised by his legal advisers, a technical objection which can at most stave off the evil day for a short time, without there being any real grievance on the part of the defendant. It is no doubt the case that, as ruled in *Kalidas Kevaldas* v. *Nathu Bhagwan* (2), the mere fact that the other adult brothers say they have no objection to plaintiff recovering the amount due on the promissory note in this suit, does not afford valid ground for saying that the suit is not bad, if it is really necessary that the other adult co-parceners should be joined in the suit.

But this evidence, though not conclusive, does go to show that this is one of those occasions referred to by the Privy Council in *Sheo Shankar's case* (11) where the principle that they mention can be properly applied. After all it is not the case that Hindu law in itself requires that all adult co-parceners should be joined.

I think, I am correct in saying that no text or commentary can be cited to that effect. It is a rule which is simply based on the principle that all persons interested should be joined in the suit. That is a rule of procedure and that rule is subject to various exceptions, among which should be the case where a person sufficiently represents other members of his family; nor, in my opinion, does such a case fall under the provisions of Order VII, Rule 4, Civil Procedure Code. No doubt the plaintiff is a representative of the family, but it does not follow that he sues in a representative character. He really sues as the holder of the promissory note which is passed in his name.

When an objection is raised by the defendant that he cannot sue without joining certain other persons, then and then only it becomes necessary for him to meet that plea by saying that "though I sue simply as the holder of the note, yet I am entitled to do so without my brothers being joined, because I am the manager of the Hindu family of which they are members." That is an entirely different case to one where the basis of the plaintiff's claim is of a representative character, such as where he sues as an executor or administrator; and accordingly I do not consider that the plaint is in any way defective.

No doubt in *Ramachandra Narayan* v. *Shripatrao* (6), there are remarks that, where a manager does sue, there should be an indication that he has

(12) (1913) 37 Bom. 340=17 I. C. 193=14 Bom. L. R. 340.

sued in a representative capacity. But it does not follow that such indication should appear necessarily in the plaint. The plaint is only one part of the pleadings and proceedings in a suit Here we have had a direct issue on the question, and the judgment will record a finding regarding the plaintiff's representation of the family.

Therefore, there would be, to anybody who is searching the case hereafter, a clear indication that the plaintiff was suing in a representative capacity, so far as that affects the question whether the other members of the joint family were bound. Here, there can be no doubt that they are bound and they have themselves said that they accept that position.

Therefore, I do not consider that the adult members of the plaintiff's family are necessary parties to the suit, and consequently I answer the first issue, in the affirmative.

Suit decreed.

A. I. R. 1922 Bombay 284

SHAH, A.C.J. AND CRUMP, J.

Emperor—Prosecutor.

v.

Hasrat Mohani—Accused.

Cr. Ref. No. 30 of 1922 decided on 11th July 1922 Reference made by the S. J., Ahmedabad.

(a) *Penal Code, Ss. 121 and 124-A—Instigation to wage war—Incitement to action is necessary.*

So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigation and, therefore, of abetting the waging of war. (34 Bom. 394 at p. 408) followed. [P. 285, C. 1.]

(b) *Penal Code (XLV of 1860), Ss 71, 121, 124-A and Cr. P.C., S. 35, Explanation—Speech coming under Ss. 121 and 124 A—Accused liable only to one punishment.*

If the Court had held that accused was guilty under S. 121, the Court could not impose a second penalty without setting aside the sentence already passed under S. 124-A as the accused would be liable to one punishment only in respect of the speech, in view of the explanation to Cr. P. C. S. 35 and Penal Code, S. 71.

Kango and *S. S. Patkar*—for the Crown.

Shah, Ag. C. J.—This is a reference under Section 307, Criminal Procedure Code, by the Sessions Judge of Ahmedabad.

The accused in this case was charged in respect of three speeches; two of these speeches were made by him at a meeting of the Indian National Congress and the third was made by him as the President of the All India Moslem League in December last at Ahmedabad. In respect of the firs two speeches he was charged under Section 124-A and in respect of the third under Sections 124-A and 121, I. P. C.

The offences under Section 124 A were triable with the aid of assessors and the offence under Section 121 was triable by a Jury in that District. He was accordingly tried by the Sessions Judge and a Jury in respect of the offence under Section 121 and with the aid of the Jurors as assessors as regards the other offences. The Jury returned a verdict of 'not guilty' under Section 121 and as assessors they were of opinion that the accused was not guilty under Section 124-A.

The learned Sessions Judge was competent to deal with the case so far as it related to Section 124-A, and differing from the assessors he found the accused guilty under that section in respect of all the three speeches, and sentenced him to suffer rigorous imprisonment for two years on each count directing the sentences to run concurrently.

There has been no appeal from these convictions and sentences and we are not concerned with that part of the case. The Sessions Judge did not agree with the verdict of the Jury as regards the charge under Section 121 and as he considered it necessary for the ends of justice to refer the case to the High Court he has done so.

We have, to consider the entire evidence in the case to give due weight to the opinions of the Jury and the Judge and to decide whether the speech in question offends against Section 121.

The accused wanted to present his case in person: and this Court ordered that he may be allowed to do so. We have now heard the learned Advocate-General for the Crown and the accused, who appeared in person.

The charge against him is that by making the speech in question he abetted the waging of war against the King

within the meaning of that Section, that is, he instigated his audience to wage such war. Whether the accused did so or not is a question of fact to be decided mainly upon the speech itself.

There can be hardly any evidence outside the speech in a matter of the kind: and it is not suggested that there is any evidence except the evidence of the witness Durgadas, representative of the Associated Press, Ex. 12. I doubt whether his opinion as to the effect of the speech is relevant; and even if it be relevant it has hardly any real value. The learned Advocate-General has mainly relied, and in my opinion rightly, upon the speech itself.

Before dealing with the speech, I may mention that as pointed out by Heaton, J. in *Emperor* v. *Ganesh Damodar Sawarkar* (1), " so long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war."

It is perfectly true, that it is not essential that as a result of the abetment the war should be waged in fact. But the main purpose of the instigation should be the 'waging of war'. It should not be merely a remote and incidental purpose but the thing principally aimed at by the instigator.

The mere fact, that a person may try to do it in an indirect and disguised manner would not be sufficient to save him from the operation of the section; but I think that the Court ought to be satisfied that he has instigated the waging of war *i.e.* the use of violence for the purpose of effecting innovations of a general and public nature. I have no desire to attempt to lay down any general proposition as to what is sufficient to constitute an abetment of the waging of war against the King within the meaning of Section 121.

Having regard to the facts of this case, it is sufficient to bear in mind what I have said above in determining the question of fact arising for our decision.

Coming to the speech itself, it may be stated at once that the appeal or instigation to violence, such as it is, is to be found in the two paragraphs at page 11 of the print, to which I shall refer presently. Apart from those paragraphs, it could not be said that the speech is open to the construction that the accused meant to instigate his hearers to violence. His plea for the change in the wording of the aims and objects of the League by substituting the words 'possible and proper' for the words 'peaceful and legitimate', and his appeal for starting immediately a parallel government independent of all British control, by setting up on a separate and permanent foundation courts, schools, art, industry, army, police and national parliament would not constitute by themselves the 'waging of war', within the meaning of Section 121, though those ideas would be open to other objections.

This speech is fairly long and it is not necessary to refer to all other matters in the speech in detail. But when it was put to the learned Advocate-General, he fairly and I think rightly, conceded that but for the two paragraphs it would be difficult to bring the case within Section 121.

His argument however, is that the speech should be read as a whole and that the above ideas coupled with the said two paragraphs amount to a sufficiently clear and direct incitement to violence for the purpose of overthrowing the government established by law in this country.

The accused has also argued that the speech should be read as a whole, and he contends that if it be so read it is nothing more than a plea for the amplification of the scope of the present aims and objects of the League, and for starting a parallel government with a view to obtain complete Swaraj, that his object was not to dissuade the members of the League from the creed of non-violence but to persuade them to adhere to it as far as possible, and to so modify the aims and objects of the League as to leave it open to any member to depart from non-violence when absolutely necessary for his self-defence.

He has argued that he definitely rejected the alternative of upsetting the present government by 'sword'; and has throughout pleaded for another alternative for establishing an independent parallel government by peaceful means resorting to violence only if it becomes necessary to do so in self-defence in future for maintaining such a government.

(1) (1910) 34 Bom. 394=5 I.C. 851=12 Bom. L. R. 105.

It will be convenient to quote the two material paragraphs instead of attempting to summarise them:—

"People are no doubt prepared to bear and suffer gladly the hardships of a few days of imprisonment. But on the declaration of Martial Law the non-violent non-co-operation movement will prove totally insufficient and useless. Amongst the Mussalmans at least there will hardly be found a man who will be prepared to sacrifice his life uselessly-man can have only one of two feelings in his heart when faced by the barrel of a gun, either to seek refuge in flight or to take advantage of the law of self-preservation and despatch his adversary to hell, the third alternative that of cheerfully yielding up one's real success will remain confined to Mahatma Gandhi and some of his adherents and fellow thinkers. I on my part fear that in general the reply to the Martial Law will be what is commonly called Guerilla warfare or in the words of the Kuran "Kill them wherever you find them." The responsibility for all this bloodshed will rest on the shoulders of the Government.

"Consequently, as representatives of the Mussalmans the members of the All India Moslem League should consider it their duty either to refrain from adopting non co-operation as their creed or free it from limitation of keeping it either of violence or non-violence, for it is not in our power to keep non-co-operation peaceful or otherwise. So long as the Government confines to the use of chains and fetters, non-co-operation can remain peaceful as it is to-day but if things go further and Government has recourse to gallows or machine guns, it will be impossible for the movement to remain non-violent. At this stage some people would like to ask, how is it that while the Hindus are content to adopt non-violent, non-co-operation as the means for attaining independence that the Mussalmans are anxious to go a step further. The answer is, that the liberation of Hindustan is as much a political duty of a Mussalman as that of a Hindu. Owing to the question of Khilafat it has become a Mussalman's religious duty also."

Reading these paragraphs it is difficult to say that they are not susceptible of the construction which the accused seeks to put upon them. In any case I am unable to say that they constitute a direct and clear incitement to violence.

Taking the speech as a whole, and taking the broad effect of these paragraphs in relation to the main theme of his speech as indicated above, *viz.*, the change in the aims and objects of the League and the immediate starting of a parallel government, I am not satisfied that it is sufficient to bring the case within the scope of Section 121, that is to constitute a clear and direct incitement to action as distinguished from a state of mind.

I have considered the reasons given by the learned Sessions Judge in support of his view. Even taking the summary of the speech as given in paragraph 8 of his charge to the Jury, I cannot say that it amounts to a clear and direct incitement to violence.

The learned Judge has observed that "step by step the speaker maps out the stages which are to culminate in possible resistance to the Government established by law."

That seems to me to constitute the weakness of the prosecution case, for it shows that the immediate and direct object is not the use of violence: but it indicates a realisation on the part of the accused as to the probable use of violence in future under certain circumstances which no doubt the accused thinks will arise, but which in fact may or may not arise. After giving my best consideration to all the arguments and the speech itself, I am unable to hold that it constitutes such an incitement to action as would bring the case within the meaning of Section 121.

At its best it is a doubtful case: and it was open to the Jury under the circumstances to find the accused not guilty.

I do not express any opinion about the exact meaning and scope of the quotation from the Quran in relation to its context in the holy book as to which there was some argument before us and upon which the accused laid some emphasis: for after all the effect of the quotation has to be considered in relation to its context in the speech, in which the words are quoted: and secondly in the

view I take of the case it is not necessary to do so.

I need hardly add that on the present reference I am only concerned with the question as to whether the speech amounts to an abetment of the waging of war; and my observations as to the speech are made with reference to that question only.

I would, therefore, acquit the accused of the charge under Section 121, I.P.C.

It is desirable to point out that in view of the explanation to Section 35 of the Criminal Procedure Code, and the provisions of Section 71 of the Indian Penal Code as interpreted by a Full Bench in *Queen Empress* v. *Malu* (2) the accused would be liable to one punishment only in respect of the speech. The learned Sessions Judge found him guilty under Section 124-A and sentenced him to two years' rigorous imprisonment in respect of the speech in question.

In case this reference had been allowed, we could not have imposed a second penalty without setting aside the sentence already passed. Though at one stage I thought that there might be some difficulty in doing so, I am satisfied that in view of the provisions of Section 307, Sub-section (3) and Section 423, Sub-section (1) clause (d) of the Code of Criminal Procedure there would be no insuperable difficulty in dealing with the case under Section 121 as regards the sentence and in setting aside the sentence under Section 124 A for that purpose, if it were necessary to do so.

Crump, J.—This is a reference by the Sessions Judge of Ahmedabad under Section 307 of the Code of Criminal Procedure. It is for us to form our own opinion on the case after giving due weight to the opinions of the Judge and the Jury. The nature of the case is such that those opinions cannot be of much assistance, for we have to deal not with facts but solely with the correct interpretation of a single speech which is Exhibit 7 in the case.

It is a common place, but one, which requires to be restated from time to time, that criminal charges must be strictly proved and that the benefit of any reasonable doubt must be given to the accused. The question here is whether the accused has committed the offence of abetting the waging of war against the King. The abetment charged is abetment by instigation, and the point for decision is whether the speech Ext. 7 discloses such instigation. Instigation is active suggestion or stimulation of emotion to do an act.

The act here is the waging of war and the waging of war is the attempt to accomplish by violence any purpose of a public nature. As to the purpose here there is no disguise. It is to bring about complete independence by establishing a republic. If the accused actively suggested to his audience that they should use violence, or stimulated them to use violence in order to achieve that purpose he is guilty. It is immaterial that he may have sought to disguise his meaning so long as the meaning is clear. On the other hand it is equally immaterial that the speech is within the scope of Section 124 A if it does not contain any active suggestion or stimulation to the use of violence.

The test, the only test, is to read the words, and to decide what is the probable effect on the audience to whom it was addressed. The words must be taken in their natural meaning and in the order in which they stand. If the result charged is not clear beyond reasonable doubt then the offence is not made out. If it is not possible to say affirmatively that the accused intended to instigate his audience to violence, then he must be acquitted, however mischievous the speech may be.

The opening portions of the speech may be summarized as follows :—

I. It would have been better had another President been elected.

II. The All India Moslem League is in a weak condition.

III. The existing objects of the League are set out. The first is "the attainment of Swaraj by the people of India by all peaceful and legitimate means."

IV. The causes of the weakness of the League are analysed The main cause is that Swaraj is not defined in accordance with Moslem desires.

V. In order to remove this cause of weakness "Swaraj" should be defined as "complete independence". The form of

(2) (1899) 23 Bom.706=1 Bom. L.R. 142 (F.B.)

Government should be "an Indian Republic on the lines of the United States of India". Further the words "peaceful and legitimate" should be deleted and the words "possible and proper" be substituted.

VI. The advantages of an Indian Republic are explained. The main advantage is the removal of the English power which is a hindrance to the removal of misunderstanding between Hindus and Mussalmans as is shown by the Moplah troubles in Malabar, as to which a long digression is introduced.

VII. After this digression the speaker returns to his main theme, *viz.* the amplification of the definition of Swaraj and the necessity of substituting "possible and proper" for "peaceful and legitimate" in defining the means by which 'Swaraj' is to be attained. The reason given for this change is that it is necessary to open the League "to those who do not honestly believe non-co-operation alone as the sole path of salvation and recognizing the possibility of other methods adopt them also." Also it is necessary to "remove the complaint of those who believe that non-co-operation can under no circumstances remain peaceful to the last and refuse to remain non-violent even in intention."

The portion of the speech summarized above leads up to the passage on which the prosecution mainly rely. So far the meaning is shortly this. "Let us define as our goal complete independence, and widen the definition of our means so as to admit all shades of opinion violent or non-violent." Up to this point the speaker advocates no line of action.

It is unnecessary for me to set out again the passage which follows. I propose to give briefly the meaning of it as I understand it. The speaker says that there are only two possible means of replacing one Government by another: one, destruction by the sword: the other by setting up a parallel Government. So far as he advocates either it is the latter. "Friends, to achieve this object we must immediately set up on a separate and permanent foundation our own courts, schools &c., &c."

He then goes on to point out that ultimately a stage will be reached when action on peaceful lines will become impossible, because the existing Government will undoubtedly interfere. When Government interferes and if and when Martial Law is declared non-violent non-co-operation will become utterly useless. For the Mussalmans at least will defend themselves when faced by the barrel of a gun. "I on my part fear" the speaker says, "that in general the reply to Martial Law will be what is commonly called Guerilla warfare, or in the words of the Koran "Kill them wherever you find them" the responsibility for all this bloodshed will rest on the shoulders of Government."

The meaning may be further illustrated by a passage which follows. "So long as the Goverment confines itself to the use of chains and fetters non-co-operation can remain peaceful as it is to-day, but if things go further and Government has recourse to gallows and machine guns it will be impossible for the movement to remain non-violent."

The substance of the matter is this. "Let us continue by peaceful means: probably in the future Government will proclaim Martial Law and use machine guns. If so certain persons will use violence in self-defence. The blame will rest on Government."

Does such language amount to instigating the waging of war? I adopt the words of Heaton, J. on this matter, "So long as a man only tries to inflame feeling, to excite a state of mind he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war" *King Emperor* v. *Ganesh Damodar Sawarkar* (1).

I cannot find here any incitement to action. The accused says no more than this. "Let us proceed on peaceful lines as long as we can. In the future some of us will be compelled to use violence in self-defence." Such language is gross sedition, but it is not to my mind an offence under Section 121 for the plain reason that there is no incitement to action.

If the worst construction is put upon the speech it amounts to a prophecy or even a threat that violence may be necessary in future. It does not suggest action here and now, or stimulate any one to such action. The distinc-

tion is clear enough if reference is made to any of those cases in which there has been a conviction under Section 121. I hold therefore that the accused cannot be held guilty of that offence.

I would only add that I agree with my learned brother as to the applicability of Section 307 read with Section 423 to the circumstances of this case.

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MACLEOD, C.J., AND SHAH, J.

Raghunath Shivaji Kulkarni and others—Plaintiffs-Appellants

v.

Ramachandra Narayan Joshi and others—Defendants-Respondents.

S. A. No. 27 of 1921 decided on 3rd August 1921 from a decision of Asst. Judge, Sholapur, in A. No. 112 of 1919.

Dekhhan Agriculturists' Relief Act (1879), S. 13—Mortgage—Accounts showing larger amount due than the Bond amount—No decree can be given for more than the bond amount.

Even if, on taking accounts under S. 13 of the Act, the Court finds that the principal sum due to the plaintiffs at the date of the mortgage bond is a greater sum than the sum mentioned in the mortgage bond, the plaintiffs having admittedly taken a bond for a lesser sum, that is all the principal amount which could possibly be considered as secured on the property mortgaged As a rule the object of directing accounts to be taken under the Act is to ascertain how much of the amount secured by the bond is principal and how much is interest, after going into the history of the transactions between the parties. But once the creditor has taken a bond, then in no possible case can he recover in a suit on the bond more than the principal amount with interest.

[P. 290, C. 1, 2.]

W. B. Pradhan for *P. B. Shingne*—for Appellants.

Macleod, C. J.:—The plaintiffs filed this suit to recover on a mortgage bond Rs. 1,500 for principal and Rs. 1,500 for interest. The 1st and 4th defendants appeared. They admitted the mortgage bond but contended that the whole consideration was not received; that the 1st defendant was in difficulty and so he admitted the previous debt of Rs. 900; that instalments should be granted; that accounts should be taken; and that the defendants only received Rs. 600 as consideration.

Accordingly the learned Subordinate Judge took accounts with the result that he found that, on the 28th January 1903, two days before the bond, the principal sum due to the plaintiffs was Rs. 3,185-13-0. Nothing was paid in cash on the day of the bond, so that taking the principal sum on the date of the bond to be Rs. 3,185-13-0, he considered that double that amount should be allowed. But as he had to take accounts up to the day of the suit, on the latter day the principal sum due was Rs. 3,338-2-0, and so he passed a decree for double that amount, *viz*, Rs. 6,676-4-0 and costs of the suit to be paid in yearly instalments of Rs. 400 each.

In appeal this decree was varied by substituting in the decretal order the words "Rs. 1,500 for principal and Rs. 1,500 for interest up to the date of the suit, together with future interest at 6 per cent. per annum on the principal amount or the unpaid portion of it, and proportionate costs," for the words "Rs. 6,676-4-0 and costs."

It seems to us that the learned Subordinate Judge took entirely a wrong view of the functions of the Court in taking an account under the Dekkhan Agriculturists' Relief Act. The plaintiffs admittedly took a bond for Rs. 1,500, and, therefore, that was all the principal amount which could possibly be considered as secured on the property mortgaged. Even supposing the learned Judge was right in finding that at the date of the bond a greater sum than Rs. 1,500 was due to the plaintiffs if they chose to take a bond for Rs. 1,500, they cannot be allowed to contend afterwards that the balance of the amount should also be considered as secured on the mortgaged property.

As a rule the object of directing accounts to be taken under the Dekkhan Agriculturists' Relief Act is to ascertain how much of the amount secured by the bond is principal and how much interest after going into the history of the transactions between

the parties. But once the creditor has taken a bond, then in no possible case can he recover in a suit on the bond more than the principal amount with interest.

We may refer to the case of *Dadabhai* v. *Dadabhai* (1) where the plaintiffs, who stated that they were agriculturists, sued to redeem and recover possession of the properties in suit, alleging that they were mortgaged by their fathers to the defendants for Rs. 2,499 on the 3rd May 1898; that accounts should be taken; and that the amount, if any, found due to the defendants, should be made payable by instalments. The learned Judge found that the plaintiffs were agriculturists; that Rs. 2,314 was the consideration for the mortgage; that the mortgage was with possession; and that Rs. 2,499 were due to the defendants on the mortgage; and that the said amount should be paid by the plaintiffs to the defendants by ten instalments. The learned Judge said:

"A commission was issued to make up these accounts. Their report is filed. I have not been scrupulously careful in examination of these calculations as more than Rs. 2,499 are to be found due under any version. I cannot allow more than Rs. 2,499 to defendants as even in the case of non-agriculturists they could not have got more".

In second appeal to the High Court it was held that the Subordinate Judge was in error in thinking that he could not award more than Rs. 2,499. Then the case was remanded to take an account according to the provisions of Section 13 of the Dekkhan Agriculturists' Relief Act. But it must be noted in that case that it was alleged in the plaint that the mortgage amount was Rs. 2,499, and therefore, all that the court decided was that on the accounts being taken it was open to the Judge to award more than the principal amount alleged to be due on the mortgage by the plaintiff.

The principle involved seems to us to be an extremely simple one, that when a mortgagee seeks to recover what is due for the principal on the mortgage bond, he cannot be allowed to say that the principal is more than what it is stated to be in the plaint. Certainly there are no provisions of the Dekkhan Agriculturists' Relief Act which would entitle the Court in taking an account to add anything to the amount stated as principal in the bond for which the mortgaged property stood security.

The appeal, therefore, must be dismissed

Decree confirmed.

(1) (1903) 32 Bom. 516 = 10 Bom. L.R. 745.

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MACLEOD, C J. AND SHAH, J.

Gulabjap—Accused No. 2-Applicant

v.

Emperor—Opposite Party.

Criminal Application for Rev. No. 191 of 1921 decided on 21st Sept., 1921 from conviction and sentence passed by the Ag. 4th Presy. Magistrate, Bombay.

Criminal P.C., S. 342—Summons Case—Non-Examination vitiates conviction.

In a summons case the omission by the Magistrate to examine the accused person as required by S. 342, is an irregularity which vitiates the conviction. [P. 291, C. 1.]

A.A. Adarkar—for Accused.

S. S. Patkar—for the Crown.

Macleod, C.J.—The second accused was charged before the Honorary Magistrate together with three other persons with having committed an offence under Section 120 of the Bombay City Police Act. The case was transferred to the Presidency Magistrate's Court, and eventually the first three accused were found guilty and fined. The second accused has applied to the High Court to exercise its revisional powers, on the ground that the accused was not questioned under Section 342, Criminal Procedure Code.

We called for a report from the Magistrate who tried the case, and he says:—

"It seems from the record that she (accused No. 2) was not examined by me under Section 342, Criminal Procedure Code, as she ought to have been, after the evidence for the prosecution had been taken. This, probably, was due to an oversight, as it is my invariable practice to examine an accused person under Section 342, Criminal Procedure Code, in every case in which the plea is of not guilty. I have only to add that the applicant was represented by a Pleader, and

called witnesses on her behalf, so that she must have been perfectly aware of the specific charge, and the allegation she had to meet."

Now it has been decided by this Court in *Fernandes* v. *Emperor* (1) that in a summons case the omission by the Magistrate to examine the accused person as required by Section 342, Criminal Procedure Code is an irregularity which vitiates the conviction. We are not at liberty to differ from that decision without referring the matter to a Full Bench. I do not think we should do that in this case.

The remarks that I shall make are only for the purpose of drawing the attention of Government to the provisions of Section 342, Criminal Procedure Code, which, in my opinion, taken in conjunction with the provisions of Section 364, Criminal Procedure Code, require amendment. Section 241 and the following sections lay down the procedure to be observed by Magistrates in the trial of summons cases.

Under Section 244 the Magistrate has to take all such evidence as is produced in support of the prosecution if the accused does not admit the offence, and also to hear the accused and take all such evidence as he produces in his defence; and under section 245 the Magistrate shall, if he thinks fit, examine the accused at the close of the evidence. Nothing is stated in those sections with regard to the Court questioning the accused before he enters upon his defence, so as to give him an opportunity of explaining the evidence given against him by the prosecution.

But under Section 342, which comes in Chapter XXIV, headed "General Provisions as to Inquiries and Trials," the Court shall, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him at any stage of any inquiry or trial, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence.

It has been contended that none of the sections prescribing the procedure to be followed in summons cases contain the words "before he is called on for his defence," whereas in the sections prescribing the procedure to be followed in the trial of warrant and sessions cases those words are used, and, therefore, it was not intended that it should be obligatory on the court to question the accused in summons cases, as section 244 only required that the accused should be heard.

I doubt whether that is a sound argument, as every accused person has a right to be called on for his defence, and when section 244 lays down that the Magistrate shall hear the accused, it certainly means that he should ask the accused what he has to say in his own defence against the charge which has been brought against him and in explanation of the evidence which has been led to support the charge.

It does not seem to me that there is very much difference between hearing the accused and questioning him generally to enable him to explain the circumstances appearing in the evidence against him; and if it had not been for the provisions of section 364, it would be perfectly correct if the Magistrate, in trying a summons case, in which he has not to take down the evidence, simply recorded the fact that the accused had been questioned under section 342.

But unfortunately section 364 (1) prescribes that—

"Whenever the accused is examined by any Magistrate...the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full in the language in which he is examined, or, if that is not practicable, in the language of the court or in English: and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers."

By sub-section (2)—

"When the whole is made, conformable to what he declares is the truth

(1) A. I. R. 1921 Bom. 374=45 Bom. 672.

the record shall be signed by the accused and the Magistrate or Judge or such court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing, and that the record contains a full and true account of the statement made by the accused."

So that even when the Magistrate is not obliged to record the evidence, he has to examine or question the accused under section 342, and then he has to observe all the provisions of section 364, with the result that the time required for the hearing of the case may be extended to a period quite out of proportion to the time which would ordinarily be taken in deciding whether the accused was guilty or not of the charge against him. It seems to me, therefore, that while it is obligatory on the Magistrates to give the accused an opportunity of explaining the evidence against him according to the provisions of section 342, Criminal Procedure Code, it is certainly desirable that he should not be hampered in these petty cases by the provisions of section 364, Criminal Procedure Code.

However, that is not a matter which this court can deal with, and it must be left to the Legislature to relieve the Magistrates of the burden which at present is cast upon them.

The result must be in this case that as the accused was not examined, the conviction must be set aside, and the fine, if paid, refunded.

Shah, J.—I concur in the order proposed. As regards the applicability of section 342 of the Criminal Procedure Code to the trial of summons cases by Presidency Magistrates and the effect of not examining an accused person as required by that section in such cases, I have nothing to add to what I have stated in my judgment in *Fernandez* v. *Emperor* (1). The section applies to such trials, and it is obligatory upon the Presidency Magistrates to examine the accused after the evidence for the prosecution is finished, with a view to enable him to explain the evidence against him.

As regards the obligation to record the examination of the accused in the manner required by section 364 of the Code of Criminal Procedure, the matter stands on a different footing; because the non-compliance with the provisions of that section may not necessarily involve the same consequences as the failure to observe the provisions of section 342 does. As the section stands at present, I am of opinion that it is obligatory upon the Magistrates to record the examination of the accused in the manner provided by the section. But I entirely agree with the observations of the learned Chief Justice that in the case of Presidency Magistrates it may be desirable to relieve them from the obligation to follow the provisions of that section in recording the examination of the accused persons in summons cases. It is to be noted that as regards the examination of an accused person in summary trials outside the presidency towns, subsection (4) of section 364 provides that the provisions of that section will not apply to such examination.

It is also significant that the Presidency Magistrates have been given very wide discretion in the matter of recording evidence in cases in which the sentences would not be appealable; and it would be consistent with the policy indicated by these provisions in the Code of Criminal Procedure to relax the provisions of section 364 of the Criminal Procedure Code in the direction suggested, so far as the Presidency Magistrates are concerned.

Conviction set aside.

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MACLEOD, C. J. AND SHAH, J.

Bhupal Tavanappa Kasturi—Plaintiff-Appellant.

v.

Tavanappa Gangaram Kasturi—Defendant-Respondent.

F. A. No. 96 of 1921 decided on 16th September 1921 from a decision of Assistant Judge, Belgaum, in Suit No. 93 of 1920.

(a) *Hindu Law—Maintenance—Suit for, by member, not entitled to claim partition, is maintainable.*

A member of a joint Hindu family, who cannot file a suit for partition without the consent of certain members of that family, if he is driven out from the family, can sue for maintenance out of the

family property. 16 B. 29 (F. B.) Ref.
[P. 293, C. 1.]

(b) *Practice—Issues—All issues in case must be raised.*

It would be better if all the issues in the case are raised. And then, if there was a preliminary issue, that could be dealt with first in appeal. [P. 293, C. 1]

A. G. Desai—for Appellant.

G. S. Rao—for Respondent No. 1.

Judgment.—The plaintiff sued for separate maintenance and marriage expenses as a co-parcener in an undivided Hindu family. The defendants are his father, uncle, cousin and step-brother. The plaintiff alleged that he had quarrelled with the defendants and was driven out of the joint family house in May 1917. An issue was raised.: "Is a suit of the present nature tenable?" That issue was answered in the negative and accordingly the plaintiff's suit was dismissed.

We might point out that it would have been better if all the issues in the case had been raised; and then if there was a preliminary issue that could be dealt with first. Undoubtedly, the plaintiff, owing to the decision of a Full Bench of this Court in *Apaji Narhar* v. *Ramchandra* (1), cannot file a suit for partition without his father's consent. The Judge says that the plaintiff has another remedy, namely, a suit for joint possession. But that is obviously a remedy which would tend to create further difficulties and aggravate the ill-feeling which appears to exist in the family.

Then the learned Judge holds that a separate suit for maintenance will not lie. It is difficult to see why a member of a joint Hindu family who cannot file a suit for partition without the consent of certain members of that family, if he is driven out from the family, cannot sue for maintenance out of the family property. In *Himmatsing Becharsing* v. *Ganpatsing* (2) it was held that a suit for maintenance out of the ancestral estate by a Hindu son lay against his father where the property in the hands of the latter was impartible. But the Court decided there that the right of a son to sue for maintenance where he might sue for partition, was not in question.

The decision of Sir Michaele Westropp, C. J., and Melville, J., in Special Appeal No. 394 of 1872 was referred to in the note. The question at issue in that case was whether a son who might sue for partition could sue for maintenance. But if the son cannot sue for partition, as in this case, then, as far as he is concerned, the family estate is just as impartible as it is when the estate is impartible amongst all the co-owners, I see, therefore, no objection whatever to allowing the plaintiff in this case to file his suit for separate maintenance. Whether he can establish his case on the evidence and obtain a decree against the defendants in another matter, can only be decided when proper issues have been raised and evidence has been taken. The decree, therefore, dismissing the suit must be set aside, and the case must be remanded to the trial Court to be dealt with on its merits.

Costs in the lower Court and of the appeal to be costs in the suit.

The Court-fees payable to Government must be recovered from the respondents.

Case remanded.

(1) (1892) 16 Bom. 29 (F.B.)
(2) 12 B. H. C. R. 94.

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MACLEOD, C. J. AND SHAH, J.

Ganesh Venkatesh Joglekar — Plaintiff, Appellant.

v.

Ramachandra Narayan Joglekar—Defendant-Respondent.

S. A. No. 719 of 1920 decided on 19th August, 1921, from a decision of D. J., Poona, in A. No. 219 of 1919.

Bombay Land Revenue Code (1879), S. 121—Enquiry Officer—Decision as to rights of one owner over the land of adjoining owner—Decision is ultra vires *and does not oust jurisdiction of Civil Court.*

It would be the duty of the Enquiry Officer in making survey of land in a town to settle the boundary between the lands of adjoining house owners, which would ordinarily be by means of a line drawn on a plan, and that line, according to the provisions of section 121 would be determinative of the rights of the land holders on either side of the boundary so fixed. But it would not be determinative of any rights which the holder of one number should claim to exercise over the land belonging to the holder of the adjoining number. Enquiry Officer's decision on the point is without jurisdiction and it does not oust the jurisdiction of the Civil Court. [P. 294, Col. 2.]

S. Y. Abhyankar—for Appellant

Coyajee and *H. G. Kulkarni* — for Respondent.

Macleod, C. J.—The plaintiff brought this suit for a declaration that the ground on which the stable described

in the plaint stood belonged exclusively to the plaintiff: that the ground under the drain described in the plaint belonged to the plaintiff: that the plaintiff had a right to remove the drain after giving proper notice to the defendant; and that in case it was found that any part of the ground under the drain was joint, an injunction might be granted against the defendant restraining him from obstructing the plaintiff while doing any work on the ground beyond that point and for further and other relief.

The plaintiff and the defendant are the owners of adjoining properties in the city of Poona, and the dispute has arisen with regard to the stable and the drain mentioned in the plaint. There had been a decision by the Enquiry Officer to the effect that the gutter and the stable were common property. The Enquiry Officer had been appointed by Government apparently under Section 131 of the Bombay Land Revenue Code for the purpose of making a survey of lands in the City of Poona. He was invested with all the powers and duties of a Survey Settlement Officer in charge of a survey, for the purposes of the survey of the lands other than those used ordinarily for the purposes of agriculture only, within the site of the city of Poona.

The trial Judge has decided that the decision of the Enquiry Officer with respect to the stable and the drain in question had no judicial force, and that he was entitled to decide that point in this suit. Accordingly the learned Judge held that the plaintiff was entitled to a declaration and injunction with respect to the stable alone. The rest of his claim was dismissed.

Against that decree the defendant appealed and the plaintiff filed cross-objections. In appeal a preliminary point was taken that the jurisdiction of Civil Courts to entertain suits of that character against the decision of the Survey Officer was ousted under the provisions of Section 121 of the Bombay Land Revenue Code. The defendant's contention was held good by the learned District Judge and the suit was accordingly dismissed. At that time the decision of this Court in *Bhaga* v. *Dorabji* (1) had not been published. That, no doubt, was a case of agricultural land. But the principles with regard to the survey of land in a town are just the same, and even stricter than they would be in the case of agricultural lands.

It would be the duty of the Enquiry Officer to settle the boundary between the lands of adjoining house owners, which would ordinarily be by means of a line drawn on a plan, and that line, according to the provisions of Section 121 of the Bombay Land Revenue Code, would be determinative of the rights of the landholders on either side of the boundary so fixed. But it would not be determinative of any rights which the holder of one number could claim to exercise over the land belonging to the holder of the adjoining number and I do not think the section can give jurisdiction to the Enquiry Officer to decide, as he has done, that a broad strip of land lying between the two numbers was common to both the adjoining owners.

I do not gather from his decision that he had fixed that broad line, measuring nine feet at one end and five feet at the other, as the boundary line according to the survey. I should prefer to read his directions as showing, if anything, that the boundary line of house No. 174 was on the west side of the common land and the boundary of house No. 175 was on the east side. But unless that broad strip could be considered as a boundary line, it certainly remains in obscurity where the boundary line between the adjoining houses runs.

If, therefore, the Enquiry Officer held that this strip was the boundary, then I think he was exceeding his functions. If he held that the boundary line of house No. 174 was on the east side of the gutter, then he had no jurisdiction to decide what rights the owner of house No. 174 had over the gutter which lay within house No. 175.

It seems to me, therefore, that the decision of the learned District Judge was wrong. The decree of the lower appellate Court must be set aside and

(1) A. I. R. 1921 Bom. 63=45 Bom. 67.

the case must go back to that Court to be decided on the merits, that is to say, the Court will decide what are the respective rights of the parties over the disputed land. The appellant must get his costs of the appeal.

Shah, J.—I agree.

Case sent back.

A. I. R. 1922 Bombay 295.

MACLEOD, C. J., AND KANGA, J.

Narasinhdas Guru Sitaram Das and another—Appellants.

v.

Khanderao Vinayak Joshi and others—Respondents.

App. No. 802 of 1920 and S. A. No. 809 of 1920 decided on 22nd March 1922.

(a) *Hindu Law—Inheritance—Sudra ascetic—Succession to, is regulated by ordinary law—Guru Bandhu is not an heir.*

All authorities are in favour of the proposition that a Sudra could not enter the order of Yatti or Sanyasi, therefore devolution of property left by a deceased person of the caste referred to, who has become an ascetic and renounced the world is regulated by the ordinary law of inheritance in the absence of proof of any general or special usage to the contrary. *22* Mad. 302 followed. [P. 296, C. 1]

(b) *Transfer of Property—Statement in a will—Cannot transfer property.*

A mere statement in a certain will that a transfer has been effected in favour of A, will not result in a transfer of property.

[P. 295, C. 2]

B. G. Desai and *A. G. Desai*—for Appellant.

Bhadurji, Mehandale, P. S. Bakhale and *P. N. Samant*.—for Respondents.

Judgment.—These are two suits filed by the plaintiff claiming to recover certain properties by virtue of his title as Mahant of the Panchmukhi Hanuman Sansthan at Bhuleswar, Bombay, and as Guru Bandhu of one Onkardas who died in 1904-05. Both suits have been dismissed. There was one judgment in both suits, and one judgment in the appeals in the court below.

The questions at issue are mostly questions of fact. The properties in question are (1) the Laxminarayan temple with the property said to be dedicated for the endowment thereof, and (2) the Pandhrinath temple with its endowment, both situated at Chandansar in the Thana District.

Admittedly, on the findings of the court below these properties were in the ownership or management of Tulsidas who appears in the pedigree at p. 1. By his will of 1898, he left these properties to Onkardas. Owing to their nature he would naturally give to Onkardas limited authority, that is to say, Onkardas had no power to sell the properties, but only the authority to manage the properties and maintain the idol.

With regard to the Laxminarayan property it was suggested that that property had been gifted to the plaintiff by the original founder Mahant Anant Narayan Naik. The only proof of that fact lies in what is said by Tulsidas in Exhibit 89, the will of 1898, in which he says that Anant Narayan had removed his right of ownership and had gifted it to the Mahant Damodardas Jamandas the Pujari of the idol of Shri five faced *Maruti* in the city of Bombay. Such a statement would confer no title on the Mahant or his successors, and it seems difficult to us to understand how the question came to be raised in the court below, whether the description in the will of Tulsidas that certain properties were gifted to the Mahant of Panchmukhi Hanuman was or was not admissible in evidence.

The question is not whether it is admissible but what is its effect. It is a mere statement. That could not result in any transfer of property, nor by itself could it possibly prove that the property had been gifted to the Mahant. But treating it from the point of view of admissibility the Judge was probably right in holding that it was not admissible. The plaintiff suing for possession must prove his title, and he cannot point to any evidence which directly shows that Anant transferred the property in this temple to his predecessor.

Then with regard to the Pandharinath temple that clearly was gifted by Tulsidas in his will to Onkardas with powers of management and a direction to make a will in respect of all the moveable and immoveable property in favour of his son, and if he did not get married, then he was

to adopt a boy and make him a Chela. Evidently the object of Tulsidas was to arrange after his decease for the continual management of the temple. Onkardas married but had no son, nor did he adopt, and after his death in 1904 the property came to the management of his widow. She disposed of a considerable portion of it, as it is alleged, for necessity. But whether those alienations were for necessity or not it is difficult to say where the title of the plaintiff to succeed to those properties is derived from.

The plaintiff alleges that he is a Guru Bandhu, that he was the spiritual heir of Onkardas, and therefore entitled to succeed to the property. But Onkardas does not come within any of those persons whose property goes to their spiritual heirs. That question was considered in *Ramdas Gopaldas* v. *Baldevdasji Kaushalyadasji* (1) where the Chief Justice refers to the passage in the Mitakshara, Chap. II, S. 8, para 2, which deals with succession to the property of Sanyasi.

Then in *Dharmapuram Pandara Sannadhi* v. *Virapandiyam Pillai* (2) : it was held that all the authorities were in favour of the proposition that a Sudra could not enter the order of Yathi or Sanyasi, so that the devolution of property left by a deceased person of the caste referred to, who has become an ascetic and renounced the world is regulated by the ordinary law of inheritance, in the absence of proof of any general or special usage to the contrary.

The parties here are Sudras, and no attempt was made to prove any general or special usage to the contrary, so that the result would necessarily follow that the devolution of property left by Onkardas would proceed according to the ordinary law of inheritance, and would, therefore, go to his heirs, and the plaintiff as spiritual heir would have no right whatever to interfere with them. The result must be that both the appeals are dismissed with costs.

Appeals dismissed.

(1) (1915) 39 Bom. 168 = 26 I.C. 607 = 16 Bom. L.R. 757.
(2) (1899) 22 Mad. 302.

A.I.R. 1922 Bombay 296

MACLEOD AND COYAJEE, JJ.

Irabasappa Bin Gangappa Dalal and another—Appellants. v.

Bhadrawa Kom Dod Basappa Prabhu Shetti—Respondent.

F.A. No. 5 of 1921 decided on 1st March 1922 from First Class, Sub-Judge, Dharwar in Suit No. 73 of 1919.

(a) *Evidence Act, S. 114—Will entirely written by testator*—Prima facie *case of genuineness made out*—Onus *shifts on defendants to establish forgery.*

There is nothing unnatural in a Hindu sonless and not in a good state of health writing a document by which directions are given to a widow to adopt the testator's nephew. It is certainly extremely improbable that a person wishing to put forward a forged will would run the risk of imitating the handwriting of the deceased or get it imitated by some one else when it would be so easy to attack a forged document when it runs over a folio page and purports to have been written by the testator. The plaintiff has to prove the document on which he relies but when once he has gone as far as putting before the Court a *prima facie* case which bears the signs of being genuine, then it is for the defendant to produce reliable grounds for upsetting the plaintiff's case and satisfy the court that it is not only improbable but impossible [P. 297, C.1. 2 P. 298,C. 2]

(b) *Evidence Act, S. 73—Comparison of handwriting—No safe inference can be drawn by comparing a postcard with a will.*

It is not fair to compare the free handwriting spread over a folio page of a will with plenty of space, and a post card in which a writer has to condense all he wishes, to say in a small space. The writing must necessarily be far more cramped and naturally various letters in the post card writing would differ from the writing which is not cramped. [P. 298, C. 2]

Bhadurji with *Nilkanth Atmaram*—for Appellants.

Strangman with *A.G. Desai*—for Respondent.

Judgment.—The plaintiff, 'a minor, filed this suit 'through his next friend, the natural father, to get a declaration of his title under a will which he propounded as being the last will of one Dod-Basappa. This document is a holograph will, purporting to have been written and executed by Dod-Basappa on the 16th September 1918. Dod-Basappa at that time was a comparatively young man, but he was suffering from chronic asthma ; and although a person may be suffering from asthma for many years without any fatal result, it is common knowledge that attacks of asthma are very unpleasant. They may vary in severity, and one of these severe attacks might have induced a desire

in Dod-Basappa to make provision for the future.

Briefly, the will, after reciting that the testator had no heirs such as near Bhaubands etc. and no male or female issue, but only his wife Bhadri, directed his wife to adopt the plaintiff, and no one else. Then there is a further direction that if the plaintiff was not adopted by Bhadri, even then he was to be the full owner of the testator's property.

There is nothing whatever against the possibility of Dod-Basappa having executed such a document. It has been suggested, and this suggestion found favour with the learned Judge, that the very inequitous nature of the will was *per se* a cogent factor against the plaintiff's case. As the learned Judge says " the plaintiff's case totters to the ground by the sheer weight of its own wickedness". But we see nothing unnatural in a Hindu, sonless, and not in a good state of health, writing a document by which directions are given to the widow to adopt the testator's nephew. He would be aware that if he died, and the adoption was made, the adopted son would succeed to the property, but during his minority the property would be managed by the widow, and the widow in any event would be entitled to maintenance even if she refused to adopt, and the boy directed to be adopted became the owner of the property. That would not, and could not, defeat the widow's rights to maintenance.

The plaintiff's case is that the will having been made on the 16th, the testator left on the 17th for Hubli. Before leaving, he handed the will to his aunt Irawa for safe custody. She says that after making the will Dod Basappa handed it to her and asked her to keep it, saying that he was suffering from asthma and that he had made a document in plaintiff's favour. He not only told her and sister Rachaway the purport of the will, but also read out the will to them. He put the will in a piece of cloth, and while delivering it to her, told her to return the document, if he recovered from his illness and returned home, if not, to hand it over to the plaintiff's father. The learned Judge says that "this story sounds like a fiction. It was ridiculously absurd and incredible, if not actually inconceivable, that a business man like Dod-Basappa would deposit for safe custody an important document like a will with an old and illiterate woman, albeit she was his aunt".

We do not know whether Dod-Basappa was a business man. But in any event we do not see anything incredible or inconceivable in his handing over this document to Irawa for safe custody, while he went away to Hubli and to Kopbal.

Dod Basappa was treated by a Doctor at Hubli, and then went on to Kopbal, where he fell ill in December and died on the 7th. 10 or 15 days after his death the plaintiff's father went to Nidgundi and obtained the will from Irawa Certainly, the will was produced by him by the 15th of January, by which time the question with regard to the correction of the Record of Rights had become important, and it is difficult to say that the delay of 20 days in producing the will must necessarily throw doubt on its genuineness.

We see, therefore, nothing in the circumstances which would throw any suspicion on the story told by the plaintiff's witnesses. Therefore, the important question is whether the evidence of the attesting witnesses could be relied upon, remembering always that this purports to be a holograph will entirely written by the testator, and it is certainly extremely improbable that a person wishing to put forward a forged will, would run the risk of imitating the handwriting of the deceased, or get it imitated by some one else, when it would be so easy to attack a forged document spreading over more than a folio page.

It would be much simpler to have had the will written out by a professional writer, in which case it would only be necessary to imitate the signature of the deceased. Therefore there is nothing improbable in the whole story put forward by the plaintiff with regard to the genuineness of the will, and on the other hand when a holograph will is attacked, the probability against such a forgery being

attempted is very strong.

Having read the evidence of the witnesses who attested the will, we do not think the strictures made against them by the learned Judge can be supported. He says " their evidence is not free from conspicuous defects. Much of it is obscure and unsatisfactory. The boldness of it is highly suspicious. The witnesses come on the scene, hear the will read out by the testator, see him appending his signature, attest the will and then disperse. This is their story in a condensed shape".

There are many cases where that is exactly what happens with regard to the attestation of a will. A witness is called to sign. He is either told, or not told, that the document which he is being asked to attest is a will. It is not necessary even for the will to be read out to him He sees the testator sign the document, and then he attests and then he is told to go.

Then the Judge says :

"They (the attesting witnesses) are singularly reticent as to the other important particulars concerning the will. They do not know whether any draft was prepared or by whom or whether any lawyer or other person was consulted. None of them, not even Huchappa, who claims to be his intimate friend and was his partner in a gin, was consulted by the deceased in respect of the will. They did not know until the last moment why they were summoned by the so-called testator. They do not even pretend to have witnessed the writing of the will by Dod-Basappa or to speak to the identification of his handwriting. They do not say why the will was left unregistered, when it could have been easily registered or why the deceased made no provision at all for his wife, whom he left absolutely at the mercy of a stranger like the plaintiff's father. On all these important matters the witnesses throw no light at all, though they speak in a parrot-like fashion the minute particulars as to the order in which they attended and left the place and the order in which they attested the Will".

We should have been very much surprised if they had possessed all that information which the Judge expected of persons who attest a will, with the result that if they could not give all these details to the court, suspicion would be cast on their evidence.

No doubt, in the first place, the plaintiff has to prove the document on which he relies, but when he has once gone as far as putting before the court a *prima facie* case which bears the signs of its being genuine, then it is for the defendant to produce reliable grounds for upsetting the plaintiff's case, and satisfy the court that it is not only improbable but impossible.

With regard to the writing of the will, the Judge has to admit that there is much resemblance in the signature on the will with the deceased' signature in the school register, Exhibit 146. He compares the writing of the will with the hand-writing on certain post-cards written by the deceased, and sets out many differences with regard to particular letters, comparing those letters in the will with similar letters in the post-cards.

Now, as the learned counsel for the appellant pointed out, it is not fair to compare the free handwriting spread over a folio page, with plenty of space, and a post-card in which the writer has to condense all he wishes to say, in the exiguous space provided by the Post Office. The writing must necessarily be far more cramped, and naturally various letters in the post-card writing would differ from the writing which is not cramped Therefore, although we do not profess to have any knowledge of Kanarese, we are not prepared to accept all these minute differences between the writing on the will and the writing on the post-cards which are relied on by the learned Judge as helping him to arrive at the conclusion that the will is a forgery.

The learned Judge himself was of opinion that the whole of the evidence produced by the defendants was suspicious and much of it concocted. That of course is not by itself conclusive, as the plaintiff had undoubtedly to prove the will on which he relied. But it certainly shows the length to which the defendants were prepared to go in order to defeat the plaintiff's case. We cannot agree with the grounds which the learned

Judge gives for not relying upon the evidence of the attesting witnesses, and the opinion he has formed as to the surrounding circumstances which went to support his appreciation of that evidence.

It seems to us that having once made up his mind to dismiss the plaintiff's suit on the ground that the will was a forgery, he was forced to take a distorted view of the plaintiff's evidence and the surrounding circumstances, in order to give reasons why he did not believe the plaintiff's case. Thus although we are adverse to upsetting the decision of the court below on a question of fact, we think on a very careful consideration of the evidence in this case, and all the circumstances connected with it, that the Judge was not justified in dismissing the plaintiff's suit. Therefore, we must allow the appeal and hold that the will has been proved.

But as the learned Judge points out "the first defendant cannot be ousted from the possession of the plaint property, unless she is first given an opportunity to adopt the plaintiff within a reasonable period of time, say six months or so. If she fails to adopt the plaintiff during this period, she should lose her right to the possession and enjoyment of the property".

We think that was a right conclusion to come to in the events that have been proved. We direct that the 1st defendant should have from the time the proceedings reach the lower court six months, within which to adopt the plaintiff, and in default of adoption, the plaintiff will have liberty to apply for a decree for possession. No order as to costs.

Appeal allowed.

A.I.R. 1922 Bombay 299.

MACLEOD, C.J.

Hanif Maulabaksh—Plaintiff

v.

Kulsam and another—Defendants.

O. C. J. Suit No. 3072 of 1921, decided on 8th October 1921.

Civil P. C. O. XXV, Rule 1—Security for costs—Temporary residence in British India for the purpose of Court proceedings is not ordinary residence in British India.

The plaintiff resident of a State outside British India, who was taking proceedings in Police Court against defendant for enticing away his wife, resided in Bombay for nine months and supported himself by his labour. The Magistrate having expressed an opinion that he should obtain a declaration of a Civil Court about his marriage, he instituted a suit for declaration. The defendants having taken out a summons calling upon plaintiff to show cause why he should not give security for the defendant's costs under Order XXV, Rule 1, on the ground that the plaintiff was residing outside British India and did not possess any immoveable property within British India.

Held: plaintiff had been staying in Bombay only for the purpose of taking proceedings to get his wife back. That does not constitute such residence as will enable him to escape the application of the rule.

[P. 300, Col. 1.]

Jinnah—for Plaintiff.

Vellani—for Defendants.

Macleod, C. J.—The parties to this suit are Sunni Mahomedans of Fatepur Sikur outside British India. The plaintiff married the first defendant in 1911 and alleges that after she attained puberty in 1918 she lived with him as his wife and thereafter the second defendant enticed away the first defendant and brought her to Bombay. The plaintiff on his arrival in Bombay in January 1921 filed a complaint against the second defendant in the Court of the Presidency Magistrate. The proceedings went on for some months in the Presidency Magistrate's Court until the Magistrate expressed the opinion that the plaintiff ought to file a suit in a civil Court to obtain a declaration as regards his marriage with the first defendant, as the accused before him produced a decree which set aside the plaintiff's marriage.

Accordingly, the plaintiff filed this suit on the 26th July 1921; and, the defendants have taken out this summons calling upon him to show cause why he should not give security for the defendant's costs under Order XXV, Rule 1, Civil Procedure Code on the ground that the plaintiff was residing outside British India and did not possess any immoveable property within British India.

Now, it is quite obvious that if the suit had been filed in January this rule would have applied and the plaintiff would have rendered himself liable to an order under the rule. But he now contends that the rule should not be

applied as owing to the Police Court proceedings he has been living in Bombay for the last nine months and supporting himself by his labour. Therefore, he is a resident of Bombay. That, no doubt, is an ingenious and plausible argument, but the fact remains that the plaintiff is really a resident of a State outside British India. He has been staying in Bombay only for the purpose of taking proceedings to get his wife back. That does not constitute such residence as will enable him to escape the application of the rule.

Summons absolute. The plaintiff to give security to the extent of Rs. 1,000 for the defendants' costs within a month.

Costs, costs in the cause.

Summons made Absolute.

A.I.R. 1922 Bombay 300

SHAH AND FAWCETT, JJ.

Bhau Adgauda Patil—Plaintiff-Appelt.

v.

Narasagauda Tatya Patil and others—Defendants-Respondents.

L.P.A. Nos. 45 and 46 of 1918 decided on 23rd August 1921 from the decision of Macleod, C.J. in S.A. Nos. 418 and 648 of 1918 reported in 44 Bom. 627.

Hindu Law—Adoption—Husband dying after making invalid adoption—Widow cannot make a second adoption during lifetime of adoptee.

The widow is bound by the act of her husband and to accept all the implications of an adoption by him, valid or invalid. In spite of the liberal interpretation of her powers to adopt in the Bombay Presidency, the Hindu Law cannot have contemplated, and certainly it has not provided, that the widow could practically ignore and supersede her husband's act of adoption. A widow can adopt only in the absence of a prohibition by her husband. That prohibition may be express or implied by the husband's act of adoption. It is implied that his widow shall not adopt any other boy to him during the life-time of the adopted boy or until the adoption is declared invalid by a competent Court at the instance of somebody other than the widow interested in the estate

[P. 301, Col. 2.]

Coyajee and *D. A. Tidjapurkar*—for Appellant.

K.N. Koyajee—for Respondent in L. P. A. No. 46 of 1920.

A. G. Desai—for Respondent in L. P. A. No. 45 of 1920.

Shah, J.—The facts, which have given rise to these appeals, are few and undisputed. The following table indicates the relationship of the parties :—

TATYA PATIL

Narasagouda, (Deft. No. 2.)	Babgouda, *alias* Adgouda—Sitabai	Sonubai, son

Adopted by Atgouda, (Deft. No. 1.)

Adgouda, the second son of Tatya Patil was given in adoption in another branch of the family. He suffered from leprosy during the last few years of his life and on the 7th June 1909 he executed a *vyavasthapatra*, whereby he made a provision for the maintenance of his wife and mother and gave the rest of his property to his natural brother Narsagouda, who is defendant No. 2 in the suit by way of gift. He changed his mind later and on the 3rd September 1909 adopted his natural sister's son, who is defendant No. 1 in the suit. He cancelled the *vyavasthapatra* on that very day and subsequently in July 1910 obtained a release from his natural brother, whereby all his property given by way of gift was reconveyed to him except certain land and a moiety of the house, which defendant No. 2 retained for himself.

We are not concerned with the portion thus retained by defendant No. 2 in this litigation. Adgouda died in 1911 leaving a widow Sitabai and the adopted son Bhujgouda. In November 1912, Sitabai adopted the plaintiff, Bhau.

On behalf of Bhau and as his guardian, Sitabai filed the present suit in October 1914 to recover possession of the property of Adgouda from defendant No. 1 the boy adopted by Adgouda during his lifetime and defendant 2, who was said to be in wrongful possession of the property in collusion

with defendant No. 1.

In the Trial Court and in the Court of first appeal, the plaintiff succeeded on the ground that the adoption of defendant No. 1 by Adgouda was invalid, and that, therefore, the subsequent adoption of the plaintiff by Sitabai was valid. Both the defendants appealed to this Court and the learned Chief Justice, who heard the appeals, held that the adoption by Sitabai during the lifetime of defendant No. 1 was invalid, and dismissed the plaintiff's suit with costs throughout. The plaintiff has preferred separate appeals under the Letters Patent. I do not quite understand why there are separate appeals, when they arise out of the same suit. We are not concerned, however, with that point.

On the facts as stated above, it is urged on behalf of the plaintiff that the adoption of defendant No. 1 was invalid, as he was the son of Adgouda's natural sister, and that Sitabai, the widow of Adgouda, was entitled to ignore that adoption as being invalid and to effect another valid adoption.

As regards the first point I do not desire to express any opinion. No special custom is proved, and both the Trial Courts and the Court of first appeal have held that the Hindu Law applicable to the three re-generate classes is applicable to the present parties. It is also settled now that the adoption of sister's son is invalid among the regenerate classes in the absence of any special custom to the contrary. The question that arises is whether the rule applies to the case of an adoption of a sister's son, when the adoptive father, long before the date of the adoption, has left his family of birth and passed by adoption in another family, or in another branch of the same family, as in the present case.

In other words, the question is whether the restrictive rule is to be limited strictly to cases of brother and sister or whether it could apply to a case where the brother has passed by adoption into another family and the former relationship is modified to that extent. No decision on the point has been cited to us: and in spite of opinions against the validity, of such an adoption, I am not prepared to decide the question without a full argument and consideration of the scope of the rule whereby the adoption in three specific cases, including the case of a sister's son, is prohibited.

Assuming, without deciding, that the adoption of defendant No. 1 by Adgouda was invalid, the question is whether Sitabai, the widow of Adgouda, could make another adoption to her husband during the lifetime of the boy adopted by her husband. The point is one of first impression. No reported precedent on the point has been cited to us: and it must be considered in the light of the power which the widow has in this Presidency to adopt, in the absence of any prohibition expressed or implied, by her husband.

It seems to me clear that the widow is bound by the act of her husband and to accept all the implications of an adoption by him, valid or invalid. In spite of the liberal interpretation of her powers to adopt in this Presidency, I do not think that the Hindu Law contemplated, and certainly it has not provided, that the widow could practically ignore and supersede her husband's act of adoption. There is no authority for it: and I think that the general effect of the Hindu Law of adoption is against such a power. Even an invalid adoption may become effective under certain conditions and the wife or rather the widow cannot go against her husband's wishes so unequivocally expressed or treat the adoption by her husband as non-existent.

According to the decision of this Court she can adopt only in the absence of a prohibition by her husband. That prohibition may be expressed or implied; and in the present case the least that is implied by the husband's act of adoption is that his widow shall not adopt any other boy to him during the life-time of the adopted boy or until the adoption is declared invalid by a competent Court at the instance of somebody other than the widow interested in the estate.

The law of adoption, as administered in this Presidency, does not interfere with the complete control of the

husband over the adoption: that control can be exercised even after his death over his widow as to whether there shall be any adoption to him and if so, whether the selection of the boy shall be regulated in any way. The widow is, of course, free to act where the control is not exercised by the husband: but it seems to me that it would be inconsistent with the control which the husband has over the act of adoption to him, to allow his widow to give a complete go-by to his act and to let her act as she has done in this case.

The following observations of Westropp J., in *Bayabai* v. *Bala Venkatesh Ramakant* (1) appear to me to be pertinent to the present point:—

"Assuming, but not deciding, that the deviation of the Maratha School is established to the furthest extent to which any of the foregoing authorities reach (namely, that the widow may, without express authority or order from her husband, and without the consent either of his or her relations, adopt a son), and without in the least degree wishing or intending to infringe on the law of adoption by a widow so far as it can be considered as established in Maharashtra, cherished as I believe that law to be by the Hindu community, or a very considerable proportion of it, yet I am not disposed to extend it, or to depart from the general Hindu Law one single step further than provincial or local usage has firmly settled as admissible. And I have not any doubt that we should extend it much beyond its present boundaries, were we to hold that the widow may adopt where the husband has, when perfectly in the possession of his senses, as well on the day preceding his death, as on the day of his death, in reply to suggestions that he should adopt a son, positively refused so to do".

I do not think that the observations of Sir Lawrence Jenkins, C. J., in *Lakshmibai* v. *Saraswatibai* (2) on the question whether the widow's power to adopt rests on any delegation from her husband or is her own inherent right, affect the present question. Taking the widow's right to be inherent and not merely delegated, it is clearly subject to the control of the husband as stated in that case. In fact in that case the learned Chief Justice proceeded to consider whether the prohibition by the husband was implied or not.

I do not think that the observations in *Sri balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (3) on the decision in *Lakshmappa* v. *Ramora* (4), which have been referred to by Candy, J., in *Lakshmibai's case* (2), affect the present point in any way, and I see no reason to think that by those observations their Lordships of the Privy Council meant to cast any doubt on the proposition that the husband can control the power of the widow to adopt after his death, expressly or impliedly, by his acts.

I may refer to the following observations of their Lordships of the Privy Council in *Yadao* v. *Numdeo* (5).

"The Hindu Law in the Maratha country of the Presidency of Bombay and in Guzarat as to the power of the widows to adopt to their deceased husbands differs widely from the Hindu Law as it has been variously interpreted in other parts of India, but whether it is the original Hindu law on that subject or, as the learned Judge in *Ramji* v. *Ghamau* (6) assumed, a deviation from it is not now an easy question to decide with certainty: probably it is a deviation.

I may respectfully add that whether it is a deviation or not, it cannot be extended in favour of the widow, in the sense in which the appellant seeks to extend it in this case, without deviating from the fundamental basis of the law of adoption.

It is urged by Mr. Coyajee that Adgouda himself could have repudiated this adoption as it was invalid in law, and that, therefore, it was open to the widow to do the same thing after her husband's death,

(1) (1866) 7 B. H. C. R. Appx. 1.
(2) (1899) 23 B. 789=1 Bom. L. R. 420.
(3) (1899) 22 M. 398=21 All. 460=26 I. A. 113 (P.C.)
(4) (1875) 12 B. H. C. R. 364.
(5) A. I. R. (1922) P. C. 216=49 Cal. 1=48 I. A. 513 (P.C.)
(6) (1882) 6 B. 498.

provided she did so within the period of limitation allowed by law. This argument ignores the fundamental difference between the power of the husband to adopt a particular boy or not to adopt at all and the position of the widow with reference to her husband's act.

Assuming, without admitting, that Adgouda could have repudiated the adoption of defendant No. 1 during his lifetime even though it had taken place in fact, it does not follow that his widow could do so after his death, when he had given no indication whatever in his lifetime that he ever intended to go back upon it. It seems to me that the widow was bound to accept the adoption by her husband as an existing and binding fact: and on that basis the adoption by her during the lifetime of the adopted son is clearly invalid.

It is also urged on behalf of the appellant that the adoption of a sister's son is invalid, and does not require to be set aside and that, therefore, the widow could act as if it had not taken place.

I have considered the decision in *Gopal Narhar Safray* v. *Hanumanta Ganesh Safray* (7) as bearing on this point. But the point which arises in the present case did not arise in that case: and the real answer to the argument is afforded by the consideration that the widow is bound by the act of her husband. It may appear somewhat anomalous that the widow should not be allowed to treat as non-existent an adoption by her husband which is invalid.

But I do not think that there is anything anomalous in the widow being required to accept the act of adoption by her husband with all its implications, at least so far as she herself is concerned.

I would, therefore, affirm the judgment appealed from and dismiss these appeals with costs.

Fawcett, J.—I concur. In my opinion, the fact, that Adgouda adopted defendant No. 1 and treated him as his adopted son till his death amounts to an implied prohibition against the widow adopting another boy during defendant No. 1's lifetime at any rate until his adoption is declared invalid at the suit of some one interested other than the widow.

Appeal dismissed.

(7) (1879) 3 B. 273.

A.I.R. 1922 Bombay 303.

KANGA, J.

Fazal D. Allana——Plaintiff.

v.

Mangaldas M Pakvasa——Defendant.

O. C. J. Suit No. 537 of 1921 decided on 30th June, 1921.

(a) *Contract Act, S. 108—Share certificates, whether goods.*

Share certificates are moveable property and therefore are 'goods' within the meaning of S. 108. 46 Cal. 331 ref. [P. 309, C. 1.]

(b) *Contract—Delivery of share certificate in blank—Transferee gets legal and equitable title.*

Delivery of share certificates with the transfers executed in blank, passes not the property in the shares but a title legal and equitable which will enable the holder to vest himself with the shares without the risk of his right being defeated by the registered owner or any other person deriving title from the registered owner. 15 A. C. 267 Foll. [P. 313, C. 1]

(c) *Contract Act, S. 19—Performance of contract obtained by fraud—Contract is not voidable.*

If a contract is obtained by fraud or cheating, it is voidable at the instance of the party defrauded or cheated; but if the *performance* of the contract is obtained by fraud or cheating, there is no authority for saying that the contract can be avoided. Where a seller is induced to perform his part of a valid contract of sale and to deliver the goods to the buyer in performance of that contract by fraud or cheating on the part of the buyer, the property in the goods delivered to the buyer passes to the buyer, and if the buyer sells and delivers the goods to a *bona fide* purchaser for valuable consideration without notice, such a purchaser gets a good title to the goods and the seller cannot recover the goods from such a purchaser. [P. 311, C 2.]

(d) *Contract Act, S. 39—Refusal to perform by one party—Not accepted by the other—Contract is not put an end to.*

When the brokers gave bogus cheques to the plaintiff, whose shares were to be sold, they should have been deemed to have refused to perform or disabled themselves from performing their promise and as the refusal or inability to perform was before the contractual time had arrived and as the plaintiff did not accept the brokers' repudiation of the contract, *Held*: that on that day no anticipatory breach occurred. S. 39 did not help the plaintiff. [P. 312, C. 2.]

(e) *Evidence Act, S. 115—Shares—Delivery of signed transfer form*—Bona fide *purchaser—Owner is estopped from claiming right to the shares.*

Where the plaintiff, by signing the transfer forms, and delivering the same and the share certificates to the brokers, who absconded without paying for the shares to plaintiff, placed them in a position to give a title to defendant, who was a *bona fide* purchaser for value without notice, *Held*: whatever right he may have

against the absconding brokers, plaintiff is estopped by his act from asserting any right to the shares. 15 A. C. 267 Foll.

(*f*) *Principal and agent*—Bona fide *purchaser from agent gets good title—Brokers in Bombay share market are* del-credere *agents—Contract Act, S. 108.*

The plaintiff, the registered owner of some shares in the Central India Mills Co., sold the said shares through a certified broker of the Bombay Native Stock and Shares Brokers' Association. The defendant had purchased one share in the same company through another certified broker. Plaintiff's broker undertook to deliver one share to the defendant's broker on the settlement day. The plaintiff duly signed a transfer form as seller of one share and it was handed over by his broker to the defendant's broker. On the settlement day the defendant's broker paid the price of the one share purchased to the plaintiff's broker and received from him a share certificate. Plaintiff's broker absconded without paying the plaintiff the price of his shares. The plaintiff thereupon filed this suit against the defendant for a declaration that he was entitled to his share certificate and for the consequential relief.

Held : that certified brokers of the Bombay Native Stock and Shares Brokers' Association are *del-credere* agents of their constituents. Their duties are strictly to adhere to the position of the agents, *held* further that the plaintiff dealt with his broker as principal with agent and as the plaintiff put forward his broker as his agent in the market to make representations to innocent third parties to the effect that the broker was authorised to transfer the plaintiff's title in the share and to receive the purchase price, the plaintiff could not be heard to say, if those representations were acted upon by innocent third parties, that his broker obtained the share certificate by cheating him. Assuming that the plaintiff dealt with his broker as principal with principal, the plaintiff having handed over the transfer form and the share certificate to his broker before the settlement day, in due performance of his contract and not by reason of any fraud of the broker, the plaintiff's title both legal and equitable passed to the broker who validly transmitted that title to the defendant. Supposing the plaintiff was induced to deliver the share certificate on the fraudulent representation of his broker which amounted to cheating, it was the performance of the contract and not the contract itself that was obtained by fraud or cheating, and the plaintiff's title both legal and equitable passed to the broker and the broker having passed that title to the defendant, a *bona fide* purchaser for value without notice, the latter was entitled to retain the share and to get it registered in his name in the books of the Company. 2 K. B. 168, Ref. [P. 315, C. 2]

Vakil, Thomas Strangman and *Inverarity*—for Appellant.

Taraporewala and *Desai*—for Respondt.

Kanga, J :—The plaintiff is a partner in the firm of Allana, Sons and Co. Up to 19th January 1921, Ebrahim Fazal, Boga, and Anveri were carrying on business in partnership in the old Bombay Share Market as share and stock brokers. Ebrahim Fazal was a member of the Native Stock and Share Brokers' Association and the card issued by the said Association stood in the name of Ebrahim Fazal. In October 1920 the plaintiff employed the said firm of brokers, whom I shall hereafter refer to as "the brokers", to transact share business for his firm of Allana, Sons and Co.

The plaintiff in October 1920 through the brokers bought twenty-five Central India Mills shares for October 1920 settlement at Rs. 4,800 per share and sold twenty-five Central India Mills shares for Moorat (November) settlement at Rs. 4,860 per share according to the rules and regulations of the Native Stock and Share Brokers' Association for his firm of Allana, Sons and Co. The twenty-five shares bought for October settlement were for the sake of convenience transferred to the plaintiff's name in the books of the Central India Mills Co. and the firm of Allana, Sons and Co. paid to the brokers Rs. 1,20,000 being the price of the said shares

At the time of the November settlement, plaintiff delivered five out of the said twenty-five shares and received from the brokers payment of the price at which the said five shares were sold. At the same time the plaintiff through the brokers carried over the remaining twenty shares to the next settlement, *i. e.*, he bought twenty shares for the Moorat (November) settlement at Rs. 4,600 and sold the same number of shares for December 1920 settlement at Rs. 4,646 according to the rules and regulations of the Share and Stock Brokers' Association (see Exhibit H.).

In the month of December 1920, the plaintiff through the brokers "budlied" nineteen shares of the Central India Mills, *i.e.*, he bought nineteen shares for December 1920 settlement and sold the same number of shares for January 1921 settlement according to the rules and regulations of the Native Stock and Share Brokers' Association.

As there was no further "budley" business done in respect of the said nineteen shares the plaintiff had to deliver the same at the time of the January settlement. 17th of January 1921 was fixed by the Native Stock

and Share Brokers' Association as the payment day (i. e., the day for the payment of money in respect of shares delivered in the market) and 20th January as the Valan day, i. e., the day for the payment of differences in respect of transactions of January settlement.

Defendant No. 1, in the middle of December 1920, employed V. C. Shroff a certified broker of the Native Stock and Share Brokers' Association as his broker to buy for him one Central India Mills share, for January 1921 delivery. Shroff bought one share for and on account of the defendant from Shiv Narain Nemani, certified brokers, at Rs. 4,215 for January 1921 delivery. Defendant No. 1 told Shroff in December 1920 that he would take delivery of the one share bought by him.

According to the rules and custom of the said Association, Shroff, who had to take delivery of one share on the January settlement, issued on or about 6th January 1921 a *kapli* (Exhibit 4) and sent the same to Chimanlal Hiralal with whom he had an outstanding contract for one Central India Mills share. That *kapli* was circulated amongst the certified brokers between whom contracts in respect of one Central India Mills share were outstanding, and ultimately that *kapli* came into the hands of Ebrahim Fazal (the brokers). The brokers retained the *kapli* because they had to deliver one Central India Mills share and informed Shroff on or before the 11th January that they had retained the *kapli*.

The brokers, before 9th January, gave the transfer forms for the said nineteen shares sold by the plaintiff for January settlement to Esmail, a cousin, of the plaintiff, for the plaintiff's signature in performance of the plaintiff's transaction of December 1920. Esmail handed over the said transfer forms to the plaintiff for his signature. On the 9th January 1921 (Sunday), the plaintiff signed the said transfer forms and gave the same to Esmail for being handed over to the brokers and left for Poona. On 10th January, Esmail delivered the said transfer forms signed by the plaintiff to J.J. Trivedi, an employee of the brokers.

According to the rules and usages of the said Association, the brokers delivered the transfer form for one share duly signed by the plaintiff to Shroff on the 11th January 1921. Shroff sent the said transfer form to defendant No. 1 for his signature. Defendant No. 1 signed the transfer form and returned the same to Shroff.

According to the rules and usages of the Association the brokers had to deliver the share certificate or certificates in respect of the one share to Shroff on 17th January 1921 and Shroff had to pay the price of the same to the brokers on the same day, an hour or two after the share certificates were delivered to him.

The brokers who have to deliver shares in the market on the payment day according to the usages of the market, receive the share certificates from their constituents before the payment day and make payments to their constituents on the payment day or a day thereafter. So, on 15th January 1921, Anveri saw the plaintiff's cousin Esmail and demanded from him the share certificates.

According to the evidence of Esmail he asked for moneys when Anveri demanded from him share certificates: Account of the price was then made up. The price of nineteen shares at the rate of Rs. 4,600 per share was Rs. 87,400. The firm of Allana, Sons & Co. had given a loan to the brokers of Rs. 4,000. Balance due in respect of that loan was Rs. 2,775 and interest on Rs. 2,775 amounted to Rs. 85-6-0. The total amount was Rs. 91,134-6-0. Anveri gave a post dated cheque (Exhibit B) for Rs. 91,134-6-0 but Esmail refused to take it.

Thereupon Anveri told Esmail that he had no money then in the Bank but he would get moneys on the 18th or 19th January from the purchasers of nineteen shares and would pay the moneys into his current account with the Bank and the cheques would be honoured on the 20th January.

Esmail further says that, relying on the said representations of Anveri, he gave to Anveri the share certificates. Esmai. forgot to calculate in the account, that was made up, interest on the nineteen shares for one month from November 1920 to December 1920 which interest amounted to Rs. 874.

So on the same day he through his servant demanded Rs. 874 from the brokers and the brokers on the same day sent to him another cheque for Rs. 874 post-dated the 20th January 1921 (Exhibit C).

On the 16th January, the plaintiff returned to Bombay from Poona and his cousin Esmail showed to him the said post dated cheques and informed him of what had happened on the 15th January.

On the 17th January, at about 12 o'clock, the brokers delivered share certificates in respect of two half-shares of the Central India Mills to Shroff, who compared the transfer form and the share certificates and found them in order and at 5-30 p. m. on the same day made payments to the brokers in respect of the said half shares. He had at that time the moneys of the 1st defendant in his hands. He had sold five Indore Malwa and five Currimbhoy Mill shares of defendant No. 1 in the market, and according to his evidence had received the sale proceeds of these shares before he paid the brokers. The brokers absconded on the 19th January without paying the moneys in respect of the said nineteen shares to the plaintiff.

The plaintiff presented the cheques to the Central Bank on 20th January and 21st January, but the same were dishonoured. Plaintiff gave a public notice in the *Times of India* of the 21st January to the effect that the brokers had fraudulently received nineteen shares from the plaintiff and had absconded and that no one should deal with the said nineteen shares.

On the 19th or 20th January 1921, defendant No. 1 sent the transfer form and two half shares to Shroff, asking him to get the same transferred to the name of defendant No. 1 in the company's books. Shroff lodged the transfer form and two half shares with the company on 20th January and the company gave him a temporary receipt (Exhibit 10).

On 20th January 1921, the plaintiff wrote a letter to the Central India Spinning & Weaving Co. asking the Company not to transfer the shares standing in the name of the plaintiff to the name of any person. The company by their letter, dated 22nd January 1921, stated that the transfer deeds in respect of thirteen shares standing in the plaintiff's name had been properly executed and called upon the plaintiff to obtain an injunction restraining the company from transferring the shares. On the 25th January the plaintiff wrote to the first defendant asking him to return the two half-shares, Nos. 12,234 A and 12,721 A, which the first defendant had lodged with the Company for getting the same transferred to his name.

The plaintiff in February 1921, filed this suit against defendant No. 1 and against the Central India Spinning & Weaving Co., defendant No. 2, praying that it might be declared that he was entitled to the said two half-shares and that the first defendant might be ordered to deliver to him the share certificates and the transfer forms in respect of the said half-shares.

On 3rd February 1921, the plaintiff obtained an interim injunction and by a consent order, dated 24th February 1921, the said interim injunction was dissolved on defendant No. 1 under-taking to pay the value of the shares mentioned in the plaint as of 26th January 1921 in the event of a decree being passed against him. The said consent order was without prejudice to the rights and contentions of the parties. Subsequently the shares were transferred to the name of the first defendant in the books of the company. By the said consent order it was agreed that the suit was to be decided as if the shares had not been transferred to the first defendant's name.

The plaintiff also filed similar suits against the purchasers of the remaining eighteen shares. Similar consent orders were passed in the said suits also on the application of the plaintiff for an injunction against the purchasers of shares and the company. Six suits filed by the plaintiff were tried by me. The parties to this suit and to the other five suits tried by me are agreed that evidence given in all the six suits filed by the plaintiff should be treated as evidence given in each of the six suits. In the plaint as

originally drafted plaintiff's case was that in December 1920 he agreed to sell nineteen shares for cash payment in January 1921 through Ebrahim Fazal, Boga and Anveri and that, according to the usage of the Bombay market, the brokers were liable to the plaintiff for the performance of the said contract.

On 15th January 1921 Esmail handed over share certificates for nineteen shares to Anveri on the representations of Anveri that, on 17th or 18th of January, the brokers would receive moneys from the purchaser and that the moneys would be paid into the brokers' current account with the Bank and the post dated cheques which Anveri gave to Esmail would be honoured. When Anveri made the said representations the brokers had no intention to make available at the Bank sufficient moneys to meet the cheques and the share certificates and transfer forms were obtained from Esmail by means of an offence and fraud and the plaintiffs were entitled to the two half-shares.

After the issues were raised counsel for the plaintiff applied for amendment of the plaint and the application was granted.

The plaintiff's case as amended is as follows :—

The plaintiff dealt with the brokers as principal with principals and not as principal with agents, that the contracts of the plaintiff with the brokers in October, November and December 1920 were voidable on the ground that the brokers had, at the time of the said contracts, formed the fraudulent intent of not paying for the said shares and had no intent of performing their promise to pay cash for the said shares and that the original contracts entered into in October 1920 and the subsequent contracts in November and December 1920 were each of them voidable by the plaintiff.

In the month of January the brokers had the said fraudulent intention and they had no intent of performing their promise that the cheques given by them would be cashed on presentation and that the contract then made was also voidable by the plaintiff, and further, that plaintiff was also entitled to avoid the contract under section 39 of the Indian Contract Act even if the contract or contracts to sell were not voidable *ab initio*.

The brokers were the purchasers of the share from the plaintiff and the brokers dealt with the purchasers in the market (the brokers of defendant No. 1 in this suit and defendants in other suits) as principals with principals and that the brokers' title being bad, they could not give to the purchaser, defendant No 1, a better title to the shares than they themselves had (section 108, Indian Contract Act) and that none of the exceptions to section 108 of the Indian Contract Act applied and so the plaintiff was entitled to the half-shares in this suit and to the shares in the other suits filed by him.

It was contended on behalf of defendant No. 1 that the plaintiff dealt with the brokers as principal with agents and not as principal with principals, and that the plaintiff did not sell the shares to the brokers but sold the same in the market through the brokers and the brokers gave the share certificates in the market in performance of the contract which the brokers had entered into for and on behalf of the plaintiff, and that the plaintiff being the seller of shares, the plaintiff's title to the shares was transmitted to the first defendant.

It was further contended that even if the plaintiff dealt with the brokers as principal with principals and the shares were purchased by the brokers from the plaintiff, the brokers were in possession of the shares under a valid contract with the plaintiff and the property in the shares passed to the brokers and the brokers could give a good title to the shares to defendant No. 1 who was a *bona fide* purchaser for value without notice of the two half-shares of the Central India Spinning & Weaving Co.

It was also contended on behalf of defendant No. 1 that the plaintiff, having delivered transfer forms duly signed by him and the share certificates to the brokers who handed over the same to the broker of the first defendant and received the price of the shares from the broker of the first defendant, was estopped from questioning the title of the first defendant;

who was a purchaser for value without notice, to the said two half-shares.

All the three partners, Ebrahim Fazal, Boga and Anveri, absconded on 19th January 1921 and their whereabouts are not known. The cheques given by them to the plaintiff on 15th January were dishonoured. From the current account of Messrs. Boga and Anveri with the Central Bank of India (Exhibit F) it appears that from 1st January 1921 up to 19th January 1921 there was a debit balance of Rs. 11,000 against Messrs. Boga and Anveri. From the current account of Ebrahim Fazal Visram with the National Bank of India (Exhibit Q) it appears that on 31st December 1920 there was a credit balance of Rs. 8-15-2 and on 31st January 1921 a credit balance of Rs. 5-13-2.

Thirty-three certified brokers of the Native Stock and Share Brokers' Association have sent in their claims against the brokers to the Secretary of the Association in respect of the share certificates delivered by them to the brokers at the time of the January settlement. According to the said claims the debts due by the brokers amount to Rupees four or five lacs. Thirty certified brokers have sent in their claims to the said Secretary against the brokers in respect of differences due to them for the January settlement.

The total amount of claim in respect of such differences is Rs. 40,000. Haji Bachu Ali, the father-in-law of Boga, says in his evidence that he had entered into large 'budley' transactions through the brokers, and the brokers had to pay to him on the 17th or 18th January 1921 a sum of Rs. 1,89,000 in respect of 'budley' transactions; that the brokers, on 17th January 1921, took away from him share certificates of 6,500 shares of various Companies and transfer forms signed by him in respect of the said shares and the brokers gave him on 18th January 1921 twenty-three cheques all payable to Ebrahim Fazal or bearer of the value of Rs. 1,27,000 and stated that they would send to him the balance of Rs 62,500 the next day.

Out of the said twenty-three cheques, twenty-two were crossed and one was not crossed. On 19th January the one cheque that was not crossed was cashed by Aladin, an employee of Haji Bachu Ali. Haji Bachu Ali further says that as his son was not in Bombay and that as he did not know how to read or write, he gave fifteen cheques to Visram Esmail & Co. and six cheques to Mahomedali Visram. Visram, Esmail & Co. paid the said fifteen cheques into their current account with the Bank of India and gave to Haji Bachu Ali the cash amount of the fifteen cheques. Mahomedali Visram paid the said six cheques into his current account with the Central Bank of India and gave to Haji Bachu Ali the cash amount of the said six cheques.

One crossed cheque was cashed by Shariff Hasham by paying the same into his account with the Imperial Bank of Persia. Haji Bachu Ali received the moneys in respect of all the said twenty-three cheques on 18th or 19th January. According to his evidence he has a claim of Rs. 62,619-5-0 against the brokers.

On the evidence before me, it is quite clear that the first defendant and defendants in the other suits filed by the plaintiff acted with perfect good faith and purchased the shares for value. Except where a share-holder is estopped from denying the title of some particular transferee the general rule of English law is that a purchaser of shares acquires no better title than his vendor himself has (*Colonial Bank* v. *Cady and Williams* (1), and that shares in this respect are like other goods and chattels: see *Cole* v. *North Western Bank* (2), and Lindley on Companies Vol. I, p. 658 (6th Ed.).

The expression "goods" in section 101 of the Indian Contract Act includes all moveable property: *See* section 76 of the Indian Contract Act The General Clauses Act No. I of 1868, section 2, sub-section 6, defines moveable property as meaning property of every description except immoveable property and sub-section 5 defines immoveable property as including land, benefits to arise out of

(1) (1890) 15 App. Cas. 267=63 L. T. 27=60 L. J. Ch. 131=39 W. R. 17.
(2) (1875) 10 C. P. 354=32 L. T. 783=44 L. J. C.P. 233.

land and things attached to the earth or permanently fastened to anything attached to the earth. It is enacted by section 28 of the Indian Companies Act that shares in a Company shall be moveable property. Share certificates are moveable property and are therefore " goods " within the meaning of section 108 of the Indian Contract Act, *See* Ill. (*a*) to section 83 of the Indian Contract Act and *Hazarimull Shohanlal* v. *Satish Chandra Ghose* (3)

Counsel for the plaintiff as well as for the defendant admitted that Chapter VII of the Indian Contract Act applied to share certificates. Under section 108 of the Indian Contract Act no seller can give to the buyer of goods a better title than he himself has except in cases falling within the exceptions to that section.

Assuming that the plaintiff dealt with the brokers as principal with principals the question is, whether the first defendant is entitled to the two half-shares mentioned in the plaint ?

It was argued for the plaintiff that the Court must infer that the brokers in October, November and at all events in December 1920 conspired together to purchase a lot of shares without any intent of paying for them, and that they had, at the time they entered into the transactions with the plaintiff in October, November and December 1920, formed the fraudulent intent of not paying for the said shares and had no intention of performing their promise to pay for the said shares sold, from the following facts, namely

(*a*) The brokers bought a large number of shares. The plaintiff has filed eight suits against ultimate purchasers in respect of the nineteen Central India Mills shares sold to and through the brokers. The brokers had bought from others also.

(*b*) The brokers took from the plaintiff share certificates and gave to him bogus cheques on Banks were they had no credit and that they gave cheques to others also which were dishonoured.

(*c*) The debts due to other brokers from the brokers in respect of the shares delivered to them in the market amounted to four or five lacs. The debts due to other brokers from the brokers in respect of differences amounted to about Rs. 30,000.

(*d*) All the three partners, Ebrahim, Fazal, Boga and Anveri absconded.

(*e*) Exhibit F shows that between 1st January and 19th January in the current account of the brokers with the Central Bank of India, there was a debit balance of Rs. 11,000 against them.

I do not think the Court can infer any such fraudulent intent in October, November or December 1920. In October the plaintiff bought through the brokers twenty five shares of Central India Mills for October and sold the same number of shares for Moorat (November). The brokers brought to the plaintiff twenty-five share certificates and transfer forms The brokers must have got transferred twenty-four shares to the plaintiff's name in the books of the Company in October. The plaintiff kept with him the share certificate and transfer form in respect of one share with the name of the transferee in blank. If the brokers had any such fraudulent intent as is contended for, in October, they would not have given the share certificates and transfer forms to the plaintiff. In November 1920 at the time of the Moorat settlement the plaintiff delivered five shares in the market and budlied twenty shares. The brokers paid to the plaintiff the price of the five shares delivered.

In December, according to the plaintiff the brokers told him that the purchasers of twenty-five shares were willing to budley (carry over) the transaction for January settlement and the plaintiff instructed the brokers to budley nineteen shares of the Central India Mills and accordingly the brokers bought nineteen shares for December and sold the same number of shares for January 1921. Some difference was due to the plaintiff in respect of December settlement. That was not paid to the plaintiff by the brokers then. The brokers promised to pay to the plaintiff the difference in January.

There is no evidence before me that in October, November and December the brokers had not entered into *bona fide* transactions and it is to

(3) (1918) 46 Cal. 331=48 I.C. 966=22 C.W.N. 1086.

much to ask the Court to infer that, in October, November, and December 1920, the brokers who were carrying on business in the share market had not the intention of paying for the shares bought by them and of performing their promise because on 19th January they absconded with a heavy liability and gave post-dated cheques to their constituents which were dishonoured.

I hold, therefore, that the plaintiff has not proved that the brokers at the time they entered into the transactions in October, November and December 1920 formed the fraudulent intent of not paying for the shares held by the plaintiff and had no intent of performing their promise to pay for the said shares. The result is that if the plaintiff dealt with the brokers as principals and not as agents and if the transactions of October, November and December were contracts between the plaintiff and brokers as between principal, and principals as contended for by the plaintiff and not as between principal and agents, the said contracts were not voidable, as consent to the same was not caused by fraud or misrepresentation. The said contracts, in my opinion, were, when they were entered into, *bona fide* contracts.

Then it was contended for the plaintiff that in January the brokers formed the fraudulent intent of not paying for the said shares and had no intention of performing their promise that the cheques given by them would be cashed on presentation and that the contract then made was also voidable by the plaintiff. The plaintiff has given his evidence in a very straightforward manner and, I accept his evidence in its entirety.

Now it is clear from the evidence of the plaintiff and Esmail that on the 15th January the brokers gave to the plaintiff two cheques post dated the 20th January 1921. Anveri told Esmail on the 15th of January that he would get moneys from the purchasers on 17th or 18th January and would pay the amount he received from the purchasers into his current account with the Bank and so he would be able to meet the cheques.

From what transpired subsequently, it might safely be inferred that when Anveri made these statements neither he nor his partners had the intention of making available at the Central Bank of India sufficient money to meet the said cheques. The said statements were false. If Anveri induced Esmail to deliver to him the said share certificates by tendering the post-dated cheques drawn on the Central Bank where he had no money and by which Bank he expected the cheque would be dishonoured, he made the plaintiff perform his part of the contract by cheating Esmail, but the question is whether Ismail was induced by the said fraud and dishonest statements to deliver the said share certificates to Anveri ?

Esmail in his evidence says that he would not have delivered the share certificates but for the representations made to him by Anveri. But both Fazal and Esmail admitted that according to the usage they were bound to deliver the share certificates before payment was made to them. Esmail in his evidence stated that he had no reason to distrust the brokers on 15th of January, He also at first stated that the plaintiff did not tell him anything about the share certificates.

When asked why he demanded payment and refused to part with the share certificates without payment, he stated that the plaintiff had told him not to part with the share certificates without receiving payment and that he did not like to part with the share certificates without asking the plaintiff about it. Plaintiff says he expected Esmail to hand over the share certificates to the brokers in the regular course of business and that he was bound to deliver the share certificates before the payment day without receiving any payment from the brokers, and that if he had been in Bombay and the brokers had asked for the share certificates he would have delivered the same to the brokers.

It seems to me, therefore, that there is no reason why Esmail should refuse to part with the share certificates without money, and when he says he demanded money when the broker asked for the share certificates, I think he believes that to be the case after the frauds of the brokers were

discovered. It seems to me that the brokers, who had by that time formed the fraudulent intent of not paying for the shares, in order that there might be no suspicions against themselves, volunteered to give a post-dated cheque and, when Esmail asked why the cheque was post-dated, told him that the purchase money would be put into the Bank and the cheque would be honoured.

I am of opinion that Esmail would have parted with the share certificates even though no cheque or money had been paid to him and no representations made to him, though now he honestly believes that he would not have done so without being paid.

I hold therefore, that the plaintiff handed over the transfer forms and delivered the share certificates in performance of the contract of December 1920 and that Esmail was not induced to deliver the share certificates by reason of the fraudulent representation of Anveri and that the share certificates and transfer forms were not obtained from the plaintiff's cousin Esmail by means of on offence and fraud.

The nineteen shares were appropriated by the plaintiff for the purpose of the contract of December 1920 with the brokers and that appropriation was assented to by Anveri who took the share certificates, and the plaintiff's title, both legal and equitable, in the shares passed to the brokers and the brokers transmitted their title to the shares both legal and equitable to the first defendant and the other purchasers.

But, in my opinion, the result would be the same if Esmail was induced to perform his part of the contract of December 1920 and to deliver the nineteen share certificate on the fraudulent representation of Anveri that he would get the purchase money of the nineteen shares from the purchasers in the market and would pay the amount of purchase money into his account with the Bank and the post-dated cheques would be honoured. The contract of December 1920 was valid when made. In performance of that contract the plaintiff had to deliver to the brokers and did deliver to the brokers transfer forms duly signed by him about six days before the payment day. The plaintiff had also to deliver the nineteen share certificates before the payment day (17th January). The brokers had to pay the price to the plaintiff on the payment day or on the day following the payment day.

Now I assume that the brokers induced the plaintiff to perform his part of the contract by representing to him that the brokers would perform their part of the contract of 20th January, and the plaintiff performed his part of the contract because he was deceived into believing that the brokers would perform their part of the contract. If a contract is obtained by fraud or cheating, it is voidable at the instance of the party defrauded or cheated; but if the performance of the contract is obtained by fraud or cheating, there is no authority for saying that the contract can be avoided. It was held in *Jamse'ji Nassarwanji* v. *Hirjibhai Naoraji* (4) that fraud in the performance of a contract, apart from its making, is no ground for rescission and restoration of the parties to the position in which they were before the contract was entered into. From section 108 (3) of the Indian Contract Act, it appears that if the contract is rendered voidable because it was obtained by cheating or any other offence no property passes to the buyer.

But there is no authority for extending that proposition and saying that where performance of the contract is obtained by fraud or cheating, the property in the goods delivered in performance of the contract does not pass to the buyer. In my opinion, where a seller is induced to perform his part of a valid contract of sale and to deliver the goods to the buyer in performance of that contract by fraud or cheating on the part of the buyer, the property in the goods delivered to the buyer passes to the buyer, and if the buyer sells and delivers the goods to a *bona fide* purchaser for valuable consideration without notice, such a purchaser gets a good title to the goods and the seller cannot recover the good from such a purchaser.

The seller has his remedies against the buyer under the contract and can sue him for the price of

(4) (1912) 37 Bom. 158 = 19 I. C. 406 = 15 Bom. L. R. 192.

goods. When goods sold have been delivered to the buyer and the price of the goods is not paid by the buyer, the seller can only sue the buyer for the price of goods except in the following cases:—

(*a*) A seller is entitled to rescind the contract and retake possession of the goods delivered to the buyer on failure of the buyer to pay price at the time fixed where it is stipulated by the contract that he should be so entitled: (section 121 of the Indian Contract Act.)

(*b*) Where the contract is voidable or terminable by the seller, the seller may disaffirm the contract and retake possession of the goods which have been delivered under the contract.

(*c*) The seller may also rescind the contract and retake possession of the goods where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff. In such a case if the parties are *in pari delicto* the seller cannot rescind the contract and retake possession of the goods from the buyer.

Even in cases (*a*), (*b*) and (*c*) the seller cannot retake possession of the goods which have been delivered to the buyer under the contract where the ownership of the goods is transferred by the buyer to a third person who, before the contract is rescinded, buys them in good faith, of the buyer who is in possession of the goods unless the circumstances which render the contract voidable amount to an offence committed by the buyer or those whom he represents: *see* section 108, Exception 3, Indian Contract Act.

I hold, therefore that even if Esmail was induced to part with the share certificates on the fraudulent representations of Anveri which amounted to cheating, the plaintiff's title both legal and equitable in the shares passed to the brokers and the brokers passed their title in the two half-shares to defendant No. 1 who is entitled to retain the two half-shares.

Then it was contended that the plaintiff was entitled to avoid the contract under section 39 of the Indian Contract Act. Section 39 deals with discharge of contract by breach. The Indian law on the subject of discharge of contract by breach is contained in sections 39, 51, 53, 54 and 55 of the Indian Contract Act. Section 39 deals with the two cases in which a party to a contract before or at the time fixed for its performance (*a*) refuses to perform his promise, and (*b*) disables himself from performing his promise. In either case the promisee may put an end to the contract unless he has signified by his words or conduct his acquiescence in its continuance. Where a party to a contract refuses to perform or disables himself from performing his promise before the contractual time for performance has arrived, the promisee may put an end to the contract and if he does so, an anticipatory breach of the contract occurs.

When a party to a contract refuses to perform or disables himself from performing his promise at the time fixed for its performance, he commits a breach of the contract unless, by agreement between the parties, further time is given and the contract is kept alive. In this case the time for performance of the contract on the part of the brokers was 17th or 18th January.

The plaintiff took the post-dated cheque and gave time to the brokers till 20th January. The cheques were dishonoured on 20th January and so the brokers failed to perform their part of the contract and committed a breach of the contract on 20th January 1921 If on 15th January when the brokers gave the bogus cheques they are to be deemed to have refused to perform or disabled themselves from performing their promise the refusal or inability to perform was before the contractual time had arrived and as the plaintiff did not accept the brokers' repudiation of the contract that day no anticipatory breach occurred. In my opinion, therefore, section 39 of the Indian Contract Act does not help the plaintiff.

Then it was argued on behalf of the plaintiff that the plaintiff's signature as seller in the transfer forms was not attested and the transfer deeds were not stamped at the time the plaintiff and defendant No. 1 signed the same. It was further contended that by delivery of transfer forms in blank signed by the seller and the share certificates property in the shares does not pass to the purchaser,

Section 28 of the Indian Companies Act enacts that shares shall be transferable in manner provided by the Articles of the company. Article 33 of the Articles of Association of the Central India Mills provides that shares will be transferred by an instrument in writing. It gives a transfer form. Article 34 provides that every instrument of transfer shall be executed both by the transferor and transferee. The Articles do not require any attestation. So there is nothing in the contention that the plaintiff's signature was not attested when the plaintiff signed the transfer forms. Under the Indian Stamp Act if the transfer forms are not duly stamped, on payment of the penalty required by law, the defect is cured.

It is a common practice for a seller of shares to sign an instrument of transfer with the name of the transferee in blank. The buyer then inserts his own name or without doing so resells and hands the blank transfer to the new purchaser who again either inserts his own name as the transferee or resells and delivers the transfer still in blank to the purchaser from him and so on. Delivery of the share certificates with the transfers executed in blank does not invest the holder of the certificates and the transfer forms with the ownership of the shares in the sense that no further act is required in order to perfect his right. The transferor continues to be the shareholder recognised by the company.

As pointed out by Lord Watson in *Colonial Bank* v. *Cady and Williams*, (1) delivery of the share certificates with the transfers executed in blank passes not the property in the shares but a title legal and equitable which will enable the holder to vest himself with the shares without the risk of his right being defeated by the registered owner or any other person deriving title from the registered owner.

In my opinion, therefore, assuming that the shares were purchased by the brokers from the plaintiff as contended by the plaintiff, the first defendant is entitled to retain the shares and to fill in the blanks in the transfer forms and get the shares registered in his name in the books of the company.

If I am right in holding that even if the brokers dealt with the plaintiff as principals with principal, the first defendant is entitled to retain the shares and the plaintiff has no claim to the same, it is unnecessary to determine the question whether the brokers acted as the plaintiff's agents and if so whether the plaintiff is liable for the fraud of the brokers and has no claim to the shares and the question of estoppel raised by the first defendant's counsel. But as this case may go further I shall express my opinion on the above mentioned questions.

Mr. Inverarity has contended that the plaintiff dealt with the brokers as principal with principals and not as principal with agents. He further contended that the contracts of share brokers with their constituents in Bombay are contracts on *pakki adat* terms. The incidents of a contract entered into on *pakki adat* terms are given in *Bhagwandas* v. *Canji* (5).

No evidence has been called to show that the relations between the plaintiff and the brokers were governed by the usages of the Bombay market known as the *pakki adat* system. No attempt has been made up to now in any case between a share-broker and his constituents in these courts to show that transactions between a share-broker and his constituents are entered into on *pakki adat* terms. The evidence clearly shows that the broker is bound to sell the shares in the market at the proper rate and cannot buy for his constituents his own shares nor sell to himself the shares of his constituents. I, therefore, hold that the contracts of the plaintiff with the brokers were not on *pakki adat* terms.

The next question is, whether the transactions between the plaintiff and the brokers were between principal and principals, in other words, between buyers and sellers? In the plaint as originally drafted it is stated that the plaintiff sold nineteen shares through the brokers who were carrying on business as share-brokers on the old stock exchange and that according to the usage of the Bombay Share Market the brokers were liable to the plaintiff for the performance of the

(5) (1905) 30 Bom. 205 = 7 Bom. L. R. 611.

contract. Ebrahim Fazal was a member of the Native Stock and Share Brokers' Association and the brokers' card stood in his name. The plaintiff has produced the contract note, dated 22nd November 1920, sent to the plaintiff by the brokers. According to the contract note Exhibit H, twenty shares were bought for Moorat (November) settlement at Rs. 4,600 and sold for December settlement at Rs. 4,646 by the brokers by plaintiff's orders and on plaintiff's account subject to the rules and regulations of the Native Stock and Share Brokers' Association.

The plaintiff has admitted that all his transactions with the brokers were subject to the rules and regulations of the Native Stock and Share Brokers' Association. It is argued that as by the rules and usages of the Bombay Share Market brokers are personally liable to the brokers with whom they transact business and are also personally liable to their constituents, they deal with their constituents as principals and not as agents.

According to the rules and regulations of the Native Stock and Share Brokers' Association, between the brokers all business is done on the footing that they are acting as principals. Brokers can enter into transactions on their own account. Brokers when they enter into transactions on behalf of a principal do not disclose the name of the principal for whom they are acting. According to the rules of the English Stock Exchange business is done between members of the Stock Exchange on the footing that they are acting as principals but it has never been decided that a broker on the English Stock Exchange deals with his constituents as principal with principals.

It does not follow that because brokers are personally liable to the brokers with whom they transact business in the market, that they deal with their constituents as principals. Every agent who contracts personally though on behalf of his principal is personally liable and may be sued in his own name on the contract: see section 230 of the Indian Contract Act.

Further, it appears that by the rules and usages of the Stock Exchange stock brokers are personally responsible to their clients in the event of the person with whom they have made bargains for their clients of failing to carry them out. An agent, by express contract with his principal or by the usages and rules of the particular place, market or business in which he is employed, may become personally liable to the principal. Such an agent is called a *del credere* agent.

Further it is in evidence that the broker is bound to sell the shares of his client in the market at the proper rate. He is not entitled to buy his client's securities from his client nor can he sell his own securities to his client, without full disclosure and is bound to account for all profits made by him, in the course of agency, beyond his ordinary remuneration.

Mr. Inverarity in his concluding address contended that the brokers were the plaintiff's agents to sell and buy shares but that after they had bought and sold the shares they were not agents but principals. He argued that it appeared from what happened at the time of the settlement that the brokers did not keep the contracts, which they entered into for their clients, alive and they were allowed so to do by the usage of the Stock Exchange and therefore they were not agents, but principals.

Now it appears that a broker who enters into a contract for sale of a certain number of shares of a certain company on behalf of his constituent X with broker M does enter into a contract with the same broker M for the purchase of the same number of shares in the same company on behalf of another constituent Y before the settlement day. The broker, it is contended, thereby cancels the contract of his constituent X with the broker M because at the time of the settlement the brokers who have bought and sold equal number of shares of the same company pay differences only.

During each settlement there are in the ordinary course numerous dealings in the same kind of securities and on the settling day there are many brokers who have bargains to complete and some of these brokers may have both bought and sold the same securities. It would cause great delay, inconvenience, and expense, if, every seller had to deliver

securities to his immediate purchaser and actually transfer to him and receive payment from him when both may have had other dealings in the securities and have bought from or sold to other members who also may have re-sold or re-purchased.

To avoid this the following method is adopted by the brokers who are members of the Native Stock and Share Brokers' Association. The brokers who have bought and sold equal number of shares in the same companies pay differences only. A broker who wants to take delivery on the settlement day, on behalf of his constituent, calls upon a broker with whom he has an outstanding contract for purchase of the shares of which he wants to take delivery even though the broker did not buy from him the shares of his particular constituent on whose behalf he wants to take delivery.

The broker who has to take delivery issues a *kapli* (known as ticket on the London Stock Exchange) on the first day of the settlement month to the broker with whom he has an outstanding contract in respect of the shares of which delivery is to be taken. On the *kapli* the purchasing broker writes the number given to him by the clerk of the Association who gives the printed form of the *kapli*.

The purchasing broker also writes on the *kapli* the name of the shares, the date, his own name, and the name of the broker with whom he has an outstanding contract and to whom he passes the *kapli*. That broker sends that *kapli* to the broker who has an outstanding contract with him and so on. The *kapli* is thus circulated amongst certified brokers with whom there are outstanding contracts till it comes into the hands of the broker who has to deliver shares on behalf of his constituent. The selling broker retains the *kapli* and informs the purchasing broker about the retention of the *kapli*. Transfer forms are signed by the constituent of the selling broker a week before the payment day.

The selling broker then gives the transfer forms duly signed by his constituent to the purchasing broker who sends the same to his (purchasing broker's) constituent. The transfer forms are then signed by the constituent of the purchasing broker. The constituent of the selling broker delivers to the selling broker the share certificates before the payment day or on the morning of the payment day.

The selling broker gives to the purchasing broker the share certificates on the payment day. An hour or two thereafter on the same day the purchasing broker pays the selling broker for the shares according to the rate fixed by the Association. Each intermediate broker in the *kapli* pays or receives from the broker in the *kapli* with whom he has an outstanding contract the difference between the rate fixed by the Association and the rate in the contract between them as the case may be. When the transfer forms are signed by the seller and the buyer they are not stamped. The purchasing broker, after the share certificates are received by him from the selling broker and after he makes payment, puts the requisite stamp on the shares and lodges the transfer forms and shares with the company for getting the shares transferred to the name of his constituent. The purchasing broker gets temporary receipts from the company and hands them over to the purchaser.

Under this practice, the ultimate purchaser, *i. e.*, the issuer of the *kapli* is substituted as the broker with whom the ultimate seller is to complete the transaction.

I am of opinion that certified brokers of the Bombay Native Stock and Share Brokers' Association are *del credere* agents of their constituents. They are in a fiduciary relationship to their constituents. Their duties are strictly to adhere to the position of agents, to act diligently for their principals, to carry out the instructions of their principals, and to make enforceable bargains for them and keep those bargains open. If A, a broker, has bought from B, another broker, a certain number of shares and B has bought from A the same number of shares in the same company for a certain settlement they may on the settlement day agree to set off one bargain against the other and so save the necessity of completing both bargains.

I think on the whole that in the plaintiff's transactions for October, November and December 1920, the

brokers acted as the plaintiff's agents, and did not deal with the plaintiff as principals with principals.

The next question that arises is whether if the brokers acted as plaintiff's agents the right, legal and equitable, of the plaintiff in the shares, passed to defendant No. 1 (and to defendant No. 1 in other suits) enabling him to get the shares registered in his name in the books of the company.

The plaintiff authorised the brokers to sell the shares and the brokers sold them for and on account of the plaintiff in the market. The plaintiff gave to the brokers the transfer forms and the share certificates in order that the same might be delivered by the brokers in the market. When the plaintiff delivered the transfer forms and the share certificates to the brokers he intended to part with his interest in the shares to the transferee. A broker in the Stock Exchange has authority, which arises from his employment, both to make and take payments on behalf of his principals. The brokers in this case as plaintiff's agents delivered the transfer forms and share certificates in the market and received as the plaintiff's agent the purchase money of the shares. Instead of paying the money to their principal, the plaintiff, the brokers appropriated the same to their own use.

It was contended that if the brokers were plaintiff's agents they obtained the share certificates from the plaintiff by cheating, and, therefore, the first defendant acquired no title to the shares. But the principal and not the third party is responsible for the fraud of the agent. Every act done by an agent on the principal's behalf and within the scope of his actual authority is binding on the principal with respect to persons dealing with the agent in good faith.

The plaintiff having put forward the brokers as his agents in the market to make representations to innocent third parties to the effect that the brokers were authorised to transfer the plaintiff's title in the shares and to receive the purchase price of the shares cannot be heard to say, if those representations have been acted on by the innocent third parties, that the brokers obtained the share certificates by cheating the plaintiff.

Lastly, I have to consider the question of estoppel. When the blank transfer forms and share certificates are delivered under a contract by a registered holder of shares and the buyer sells the shares and delivers the blank transfer forms and shares to a *bona fide* purchaser for value, or where blank transfer forms and the share certificates are delivered by a registered holder of shares to his broker for sale in the market and the broker sells the same as the agent of the registered holder to a *bona fide* purchaser for value, the *bona fide* purchaser gets a good title to the shares and can insert his own name in the transfer form and procure himself to be registered as owner. In such cases the question of estoppel does not arise.

Mr. Taraporevalla has argued that even if there was no valid contract between the plaintiff and the brokers and even if the brokers were not acting as the plaintiff's agents, if the plaintiff signed the transfer forms and delivered the same and the share certificates to the brokers, by that act of his, he placed the brokers in a position to give a good title to defendant No. 1 who was a *bona fide* purchaser for value without notice and that the plaintiff was estopped by the said act of his from asserting any right to the shares. Mr. Inverarity for the plaintiff contended that there is no estoppel and has relied on *France* v. *Clark* (6); *Tayler* v. *Great Indian Peninsula Railway Co.* (7); *Hutchison* v. *Colorado United Mining Company and Hamill* (8); and *Fox* v. *Martin* (9).

In *France* v. *Clark* (6) the registered holder of shares deposited share certificates and blank transfers with C as security for £ 150. C deposited the certificates and the same transfers still in blank with Q as security for £ 250. It was decided that Q could only hold them as against the registered owner as security for £ 150.

In *Tayler* v. *Great Indian Peninsula*

(6) (1884) 26 Ch. D. 257 = 32 W.R. 466 = 53 L.J. Ch. 585.
(7) (1859) 4 De. G. and J. 559 = 28 L.J. Ch. 709 = 7 W.R. 637 = 5 Jur. N.S. 1087.
(8) (1886) 3 T.L.R. 265.
(9) (1895) 64 L.J. Ch. 473.

Railway Co. (7) the plaintiff who was entitled to some £20 shares and some £2 shares in a company directed his broker to sell the latter. The brokers obtained forms of transfers stamped sufficiently to pass the £20 shares. The plaintiff executed these forms leaving the blanks to be filled in by the broker. The broker inserted the description of £20 shares but left the name of the transferee still in blank and sold the £20 shares in fraud of the registered holder. The names of the purchasers were ultimately filled in, they knowing that the transfers had been previously executed in blank. It was held that the registered holder was entitled to the shares.

In *Hutchison* v. *The Colorado United Mining Company and Hamill* (*Hamill* v. *Lilley*) (8) Hamill, who was the owner of shares, delivered to his son the transfer forms signed in blank and the share certificates to deliver the same to S an intending purchaser. The son borrowed moneys by pledging the share certificates and the transfer forms in blank. It was held that Hamill was entitled to the shares.

In *Fox* v. *Martin* (9) a registered holder of shares instructed a broker to sell them for him for cash and signed a blank transfer which he handed with the share certificates to the broker. The broker deposited the share certificates and the blank transfer with his banker as security for an advance to himself. It was held, following *France* v. *Clark* (6), that the banker had no title to the shares as against the registered holder of shares.

According to the articles of the company the shares in *France* v. *Clark* (6), *Taylor* v. *Great Indian Peninsula Railway Co.* (7) and *Hutchison* v. *Colorado United Mining Company* (8) were transferable only by deed. Where the constitution of the company requires transfers to be by deed, transfers in blank are void and give no title to the transferee nor has the transferee any authority to fill up the blank: see *Taylor* v. *Great Indian Peninsula Railway Co.* (7.)

No doubt these cases are, therefore, distinguishable from the present case where the articles of the company do not require a deed for transfer of shares but it appears from the judgments in the above-cited cases and from *Fox* v. *Martin* (9), where the articles of the company did not require a deed, that the registered holders of shares were not estopped because the receipt of the blank transfers signed by third parties affected the mortgagees and the purchasers with notice. According to these cases a person who takes from another blank transfers of shares in respect of the debts of such person is bound to look to the authority of the person to use such blank transfer forms as his own.

It may be observed that the authority of *France* v. *Clark* (6) and *Hutchison* v. *The Colorado United Mining Co. and Hamill* (8) is considerably shaken by the speeches of Lord Watson and Lord Herschell in *Colonial Bank* v. *Cady and Williams* (1). The House of Lords in that case decided that there was no estoppel because the acts of the executors of the deceased registered owner in signing and delivering the blank transfers did not amount to an estoppel, but both Lords Watson and Herschell said that the same acts on the part of the registered owner himself would have amounted to an estoppel. Lord Watson said (p. 278):

"Had the transfers been executed by John Michael Williams, and the certificates thereafter sent by him to Thomas, Sons & Co., for safe custody, I should not have hesitated to hold that Blakeway, though acting fraudulently, was nevertheless placed by his act in a position to give a title to an honest purchaser which his employer could not dispute. But that is not the case with which we have to deal."

Lord Herschell said (p. 285):

"If in the present case the transfer had been signed by the registered owner and delivered by him to the brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them."

At p. 286 he said:

"The case seems to me to differ essentially from that of a transfer signed by the registered owner. He must, presumably, have signed it with the intention at some time or other of effecting a transfer. No other reasonable construction can be put on his act. And if he entrusts it in that

condition to a third party, I think those dealing with such third party have a right to assume that he has authority to complete a transfer."

These *obiter dicta* were not followed in *Fox* v. *Martin* (9) on the ground that *France* v. *Clark* (6) was not expressly overruled by the case of *Colonial Bank* v. *Cady and Williams* (1). *France* v. *Clark* (6) was followed by Bigham, J. in *Samuel Montagu and Co.* v. *Weston, Clevedon, and Portishead Light Railways Company* (10) where a sub-mortgagee of Lloyd's bond with blank transfer from Chick & Co., who had only a limited authority to deal with the security was held not entitled to recover the amount of the bonds which were issued by the defendant company. It was observed by Bigham, J. in that case that the dictum of Lord Herschell in *Colonial Bank* v. *Cady* (1) must be used in connection with the facts of that case and was not intended to conflict in any way with the decision in *France* v. *Clark* (6).

The learned Judge further observed that it might be that if a bond with a blank transfer on its back such as an American Railway Bond were handed to any one with the transfer executed by the owner, the owner would be estopped from denying the authority of the person so entrusted to deal with it but that would only be because of the inference in favour of such an authority which would be drawn from the deposit of bonds in that particular form.

The dicta of Lords Watson and Herschell were followed in the Irish case of *Waterhouse* v. *Bank of Ireland* (11) where some Pennsylvania Rail Road Company shares were handed by the plaintiffs, who were the registered owners, to a broker as margin to cover a loan with which the broker was to purchase shares in certain other companies for the plaintiffs. The broker pledged the shares for his general loan account at his bankers. He did not purchase any share for the plaintiffs but sent the contract notes purporting to have done so. The broker absconded and the plaintiffs gave notice to the bankers that they were the owners of the shares.

(10) (1903) 19 T. L. R. 272.
(11) (1892) 29 L. R. Ir. 384.

Thereafter the bankers having filled up the transfers were duly registered in the books of the company. The bankers claimed to hold the shares as security for the amount advanced by them to the broker. It was held that the plaintiffs, having delivered to the brokers share certificates with transfer forms signed by them, were estopped from asserting their ownership against the defendants who had taken them *bona fide* for value without notice.

The above-mentioned *obiter dicta* were also followed by Pickford, J., now Lord Sterndale, M. R., in *Fuller* v. *Glyn, Mills, Currie and Co.* (12) where the owner of shares after purchasing them through a broker allowed the certificates, on which were endorsed forms of transfer which were executed by the registered holder of shares, to remain in the hands of the broker and the broker deposited the same with his bankers, as security for his account with the bankers, it was held that the owner was estopped from setting up his title against the bankers. See also *Hone* v. *Boyle* (13) and the observations of Fitz Gibbon, L. J. at p. 173.

The *obiter dicta* of Lords Watson and Herschell are, in my opinion, at variance with *France* v. *Clark* (6). Brokers or bankers dealing with brokers are not put upon enquiry by the mere fact that the share certificates and transfer forms are not in the names of the brokers bringing them but are in the names of third parties.

According to English law, where the owner of shares either signs the transfer forms and delivers the same with the certificates to a broker or where never having had possession of the blank transfer forms and share certificates but knowing them to be in such condition that a broker can deal with them he allows them to remain in the broker's possession and thereby enables the broker to part with them to another who takes them upon the faith of the apparent authority of the broker to deal with them, then the true owner is estopped from questioning the title of the person taking upon the faith of the apparent authority of the broker

(12) (1914) 2 K.B. 168=83 L.J. K.B. 764=19 Com. Cas. 186=110 L.T. 318=30 T.L.R. 162
(13) (1891) 27 L R. Ir. 137.

to deal with them.

The law of estoppel is contained in section 115 of Indian Evidence Act which is in these terms :—

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".

It was laid down by their Lordships of the Privy Council in *Sarat Chunder Dey v. Gopal Chunder Laha* (14) that the terms of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel.

I have held that the plaintiff delivered the transfer forms and share certificates to the broker.

In my opinion, even if there was no contract between the plaintiff and the brokers and even if the brokers were not transmitting the plaintiff's title to the shares as the plaintiff's agents, the plaintiff, by signing the transfer forms and delivering the same and the share certificates to the brokers, placed them in a position to give a title to defendant No. 1, who was a *bona fide* purchaser for value without notice, and is estopped by his act from asserting any right to the shares.

The result is that this suit and the other suits filed by the plaintiff will be dismissed with costs.

Suit dismissed.

(14) (1892) 20 Cal. 296=19 I. A. 203 =6 Sar. 224.

A. I. R. 1922 Bombay 319

MACLEOD, C. J. AND SHAH, J.

Bai Keval and another—Defendants-Appellants

v.

Madhu Kala and another—Plaintiffs Respondents.

S. A. No. 399 of 1920 decided on 8th September 1921 from a decision of Asst. J., Surat, in A. No. 39 of 1919.

(a) *Mortgage—Discharge—Joint owners—One cannot give a valid discharge without concurrence of others.*

As one mortgagor cannot file a suit for redemption without the concurrence of the other, so also he cannot give a valid discharge without the concurrence of the other. If the word "discharge" is given a wider meaning as including any form of quittance whereby the rights and liabilities between two parties are put an end to, it could be said that the plaintiff seeking redemption gives a discharge, when he pays the mortgage debt and recovers possession of the mortgaged property from the mortgagee, thus putting an end to all rights and liabilities between the parties, so that no further proceedings could be taken. [P. 320, Col. 1]

(b) *Limitation Act, S. 7—Discharge—Joint mortgagors—Major member not filing suit for redemption in time—Minor member is not barred.*

The right to redeem a mortgage of joint family property vests in all the members of the family whoever is the manager, and it is difficult to see how the right of a minor member to redeem, which was in existence during his minority could be defeated by the fact that a major member did not file a suit to redeem within the period allowed to him. A suit for redemption of a mortgage, limitation of which expired during the minority of the two sons of the deceased mortgagor, brought three years after the attaining of majority of the elder brother but within three years of the attaining the majority of the younger brother, is not barred. [P. 320, Col. 2.]

G. N. Thakor.—for Appellants.

N. K. Mehta.—for Respondents Nos. 1 and 2.

Macleod, C. J.—The plaintiffs sued to redeem the plaint properties on payment by instalments of the sum that might be found due on taking accounts under the Dekkhan Agriculturists' Relief Act, of the mortgage of the 19th July 1892. These properties were mortgaged by the plaintiffs' father Kala to the deceased Kalyanchand. Kala died about eighteen years ago, leaving the plaintiffs and their brother Shiva, now deceased, as his heirs. The first and second defendants are the representatives of Kalyanchand, while the other defendants are alienees from the mortgagee.

There can be no doubt that the plaintiffs were entitled to redeem the properties still in the hands of the representatives of Kalyanchand. With regard to certain other properties which had been alienated, it was contended that the plaintiffs' suit was barred under Article 134 of Schedule I of the Indian Limitation Act. Admittedly the suit was brought more than three years after the first plaintiff came of age, but less than three years after the second plaintiff came of age.

The Trial Court, in considering whether the provisions of section 7 of the Indian Limitation Act applied, considered that on referring to the form of the decree in a redemption suit, it is the mortgagee who has to

give a discharge and not the mortgagor, therefore, section 7 did not apply at all. He considered, however, that the suit of the first plaintiff was barred by limitation. So he gave a decree to the second plaintiff only and directed that various amounts should be paid to the various defendants as stated in the decree.

On appeal the learned Assistant Judge considered that as the equity of redemption was vested in all the heirs of Kala jointly, it was not open to the others to grant a valid discharge without the concurrence of Kika, the second plaintiff. He did not agree with the view of the Court below that section 7 of the Indian Limitation Act did not apply. The decree of the lower Court was varied so as to make it in favour of both the plaintiffs, while the amount payable to defendants Nos. 3 to 5 was increased by Rs. 200.

In the appeal before us it has been urged that section 7 of the Indian Limitation Act applied to the plaintiffs; that the second plaintiff was one of several persons jointly entitled to institute a suit, and was under the disability of minority, but as a discharge could have been given without the concurrence of the second plaintiff by the first plaintiff, therefore, time ran against both plaintiffs from the date the first plaintiff attained majority.

No doubt there is some foundation for the difficulties which the learned Subordinate Judge thought existed in applying the provisions of section 7 of the Indian Limitation Act to a redemption suit, because it is difficult to say that the plaintiff seeking redemption gives a discharge to the mortgagee, but if the word "discharge" is given a wider meaning as including any form of quittance whereby the rights and liabilities between two parties are put an end to, it could be said that the plaintiff seeking redemption gives a discharge when he pays the mortgage debt and recovers possession of the mortgage debt and recovers possession of the mortgaged property from the mortgagee thus putting an end to all rights and liabilities between the parties, so that no further proceedings could be taken. But even assuming that the two plaintiffs were jointly entitled to file a suit for redemption, there is nothing to show, when the first plaintiff came of age, that the first plaintiff could have given a discharge without the concurrence of the second plaintiff.

It is provided by the Civil Procedure Code that all parties interested in a mortgage must be parties to a suit on a mortgage ; and certainly when the first plaintiff brought the suit for redemption, the second plaintiff was a necessary party ; the question whether the first plaintiff could have carried the suit to its proper end without the concurrence of the second plaintiff, was never considered in the proceedings in either of the lower Courts.

The case of *Bapu* v. *Bala* (1), which was relied upon, was a suit of a different nature, as it was a suit by the sons of a Hindu mother to set aside alienations made by her during their minority, and it was found as a fact, when the case came before us in second appeal, that the plaintiff was the managing member of the family, and then he had a right, as soon as he attained majority and became such managing member, to bring a suit as such manager to recover not only his share of the alienated property, but the whole of the alienated property, including his minor brothers' shares.

That being so, it was held that if the elder brother on attaining majority did not bring a suit to set aside the alienation within three years, then the other brothers would be barred. But in this case there is nothing on the record to satisfy us that the first plaintiff could have filed a suit to redeem the mortgage without the concurrence of the second plaintiff ; and to that extent I think the decision of the Assistant Judge was right, although he has not considered the question from the point of view of the first and second plaintiffs being members of a joint Hindu family.

It must also be remembered that the right to redeem a mortgage of joint family property vests in all the members of the family whoever is the manager, and it is difficult to see how

(1) A.I.R. 1921 Bom. 289=45 Bom. 446.

the right of the second plaintiff to redeem, which was in existence during his minority, could be defeated by the fact that his elder brother did not file a suit to redeem within the period allowed to him.

There is also this further fact that the minor's mother was alive and was managing the property after her husband's death. There is no evidence to show that the first plaintiff took over charge from his mother. It seems to me, therefore, that the second plaintiff would certainly be entitled *prima facie* to redeem the mortgage. The onus lay upon the defendants to show that he was barred, and they have not proved the facts that were necessary to create the bar.

It follows that both the plaintiffs are entitled to redeem and though we are not in agreement with either of the judgments in the Courts below, the decree of the lower appellate Court is correct and appeal must be dismissed with costs.

Shah, J.—I concur.

Appeal dismissed.

A. I. R. 1922 Bombay 321.

MACLEOD, C. J., AND SHAH, J.

Dattatraya Bhimrao Sabnis—Defendant No. 1-Appellant

v.

Gangabhai Ganeshbhat Navar and another—(Plaintiff and Defendant No. 3) Respondents.

F. A. Nos. 56 and 67 of 1919 decided on 16th September 1921 from the decision of the 1st Class Sub-J., Dharwar.

(a) *Hindu Law—Adoption — Daughter-in-law succeeding as* gotraja sapinda *cannot adopt.*

Where a daughter-in-law succeeds as a *gotraja sapinda* of the last male owner in the absence of any nearer heir she cannot adopt to her husband so as to affect the devolution of the estate inherited by her as a *gotraja sapinda*. It may be that, where the adoption has the effect of divesting any estate vested in a third person, it might not be valid: but it does not follow that where it has no such effect the adoption is necessarily valid. 29 Bom. 410; 26 Bom. 526 (F.B.) and 4 Bom 219 foll. [P. 323, C. 1, 2.]

(b) *Adoption—Adoptee is in same position as natural son.*

An adopted son takes the place of natural son, and has the right to inherit the property of his adoptive mother's ancestors.

[P. 324, C. 2 & 325, C. 1]

(c) *Hindu Law—Succession—Bandhus—Son's daughter's son is preferred to Sister's daughter—Males are preferred to females only where Bandhus are equally remote from propositus.*

Per Shah, J.:—Son's daughter's son can be preferred as being a nearer bandhu to the sister's daughter, though they are both equally removed from the propositus. In the case of bandhus equally removed from the propositus one in the direct line of descent should be preferred to one in a collateral line.

[P. 327, C. 2]

As regards the question about ranking all female bandhus after the male bandhus it seems that the two decisions 45 Bom 353 and 45 Bom. 768 of Bombay High Court proceed upon a somewhat incomplete relation of the position of the female bandhus in Bombay Presidency, and do not give that effect to the test of propinquity which alone is to be determinative of the right to inherit in the case of distant blood relations. Among bandhus of the same class, and of the same degree of nearness to the propositus in the same branch, the males are preferred to females; for instance in the case of sister's son and sister's daughter, the son would be preferred to the daughter. But whether it is proper to go beyond that is a point which requires consideration.

[P. 325, C. 1, 2.]

Per Macleod, C.J.:—Though some may think that High Court in deciding that all male bandhus should be preferred to female bandhus without regard to propinquity has gone too far, still there is no authority for the proposition, that bandhus of different sex but of equal propinquity should take equally.

Nilkanth Atmaram—for Appellant.

Coyajee and *R. A. Jahagirdar*—for Respondent No. 1.

Shah, J.:—Several questions of fact and law arise in these appeals.

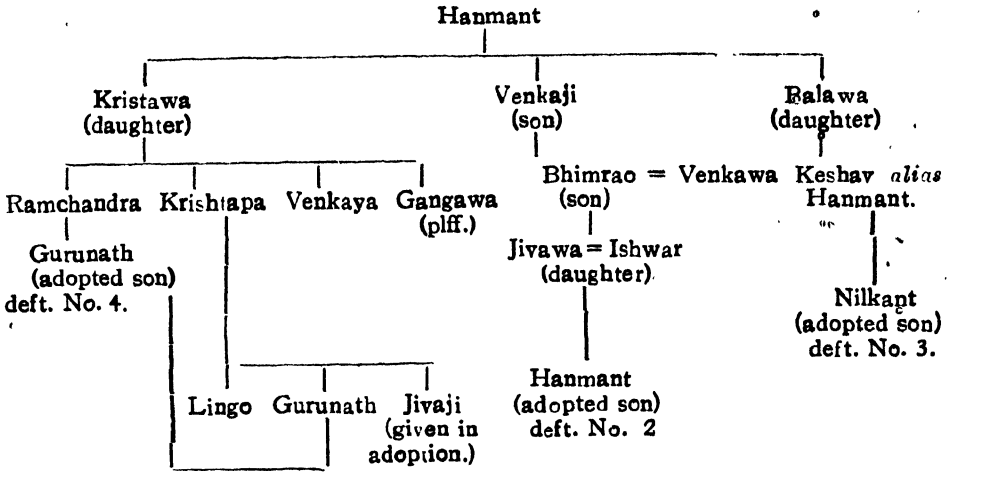
The genealogical table (on P. 322) indicates the relationship of the parties subject of course to their contentions as to certain facts:—

Gangawa, who claims to be the daughter of Kristawa, is the plaintiff in this case.

Defendant No. 1, Dattatraya, not shown in the above table, claims to have been adopted by Venkawa, the widow of Bhimarao. Defendant No. 2 claims to be the adopted son of Jivawa, the daughter of Bhimrao.

Defendant No. 3 is the adopted grandson of Balawa. Defendant No. 4 is the adopted son of Ramchandra, son of Kristawa.

The last male owner of the property in suit was Venkaji. Bhimrao, son of Venkaji, predeceased Venkaji leaving a widow Venkawa and a daughter Jivawa. He died in union with Venkaji. Venkaji died in 1880, and his widowed daughter-in-law Venkawa got the property; whether she got it as an heir or under the will said to have been made by Venkaji in her favour is a matter to be considered. Venkawa died on the



26th December 1907.

The present suit was filed by Gangawa to recover possession of the property mentioned in the plaint with mesne profits. She claimed to be the heir of Venkaji as his sister's daughter. She claimed on the footing that Venkaji was the last male owner and that the inheritance was to be traced to him. She alleged that the adoption of defendant No. 1 did not take place in fact and that even if it took place it was invalid; that defendant No. 2 was not adopted by Jivawa that he had no title to the property, which was said to have been wrongfully retained by him, and that defendants Nos. 3 and 4, who claimed to be entitled to the property, had no title to it.

Defendant No. 1 contended that he was validly adopted by Venkawa, that the plaintiff was not the daughter of Venkaji's sister Kristawa as alleged by her and that in any case defendants Nos 2, 3 and 4 were nearer heirs to Venkaji than the plaintiff and that as he had settled with them he was entitled to retain the property as against the plaintiff. He further contended that certain property was the property of Venkawa and that at least so far as that property was concerned the plaintiff had no right to it.

Defendant No. 2 claimed to be the nearest heir of Venkaji as well as of Venkawa as the adopted son of Jivawa, and maintained that he was entitled to the whole property. He repudiated the settlement referred to by defendant No. 1.

Defendant No. 3 claimed to be a nearer heir as the sister's son's son than the plaintiff and repudiated the settlement relied upon by defendant No. 1.

Defendant No 4 claimed to be a nearer heir than the plaintiff on the same ground as defendant No. 3 but admitted having relinquished his rights in favour of defendant No. 1 and conceded that the defendant No. 1 was the real owner of the property.

The trial Court held that the plaintiff was the daughter of Kristawa, sister of Venkaji, that the adoption of defendant No. 2 by Jivawa was proved, that the adoption of defendant No. 1 by Venkawa was neither proved, nor valid, that the will of Venkaji set up by defendant No. 1 was not proved, that the plaintiff was a nearer heir than defendants Nos. 3 and 4 and that the plaintiff and defendant No. 2 were equally removed from the last male holder and that therefore they were equally entitled to the property.

Accordingly a decree for partition was passed in favour of the plaintiff As regards the land which was alleged to have been acquired by Venkawa on her own account, it was found that it was not shown to be her Stridhan, and it was held that in any case the property would go to the plaintiff and defendant No. 2.

Both the plaintiff and defendant No. 1 have preferred separate appeals to this Court and practically all the points which were contested in the lower Court arise for our decision here. (On questions of fact, his Lordship upheld following conclusions of the

lower Court:-(a) that plaintiff Gangawa was the daughter of Kristawa, Venkaji's sister; (b) that Hanmant, defendant No. 2, was validly adopted by Jiwava; (c) that the will of Venkaji was not proved, and that Venkawa must be taken to have inherited the estate of her father-in-law according to Hindu law as the widow of the nearest *gotraja sapinda*, and that the adoption of Dattatraya defendant No. 1 was not proved. Strictly speaking the question of the validity of the adoption of defendant No. 1 does not arise. But in view of the argument on the question it seems to me to be desirable to decide that question. And in any case its invalidity if established could afford an additional ground for ignoring the adoption. The will of Venkaji not having been proved, no question of his consent to an adoption by Venkawa could arise, the only consent suggested being that contained in the will.

According to the decision of this Court in *Lakshmibai* v. *Vishnu Vasudev* (1) the consent of the father-in law would be operative only during his life time. So the consent such as is contained in the will, even if proved, would not avail defendant No. 1.

It is urged, however, that Venkawa by adopting defendant No. 1 did not divest any estate vested in a third person, that the adoption had only the effect of divesting the estate vested in her, and that on that ground the adoption is valid.

According to the decision of this Court that is not a conclusive test of the power to adopt. It may be that where the adoption has the effect of divesting any estate vested in a third person it might not be valid: but it does not follow that where it has no such effect the adoption is necessarily valid. That view has been accepted in *Ramkrishna* v. *Shamrao* (2).

The *ratio decidendi* of this case has been approved by the Privy Council in *Mudana Mohana Deo* v. *Purushothama* (3). It has been applied by this Court in *Datto Govind* v. *Pandurang Vinayak* (4), specifically to the case of a widow succeeding as a *gotraja sapinda* of the last male owner under the rule established by *Lallubhai Bapubhai* v *Mankuvarbai* (5) and approved by the Privy Council in *Lalloobhoy* v. *Cassibai* (6) in consequence of the absence of nearer heirs.

In the present case the daughter-in-law succeeded as a *gotraja sapinda* of the last male owner in the absence of any nearer heir: see *Vithaldas Manickdas* v. *Jeshubai* (7). It is clear that Venkawa could not adopt to her husband so as to affect the devolution of the estate inherited by her as a *gotraja sapinda*.

I may add that in the argument it has not been suggested that Venkawa could have adopted to her deceased husband during her father-in-law's lifetime without his consent and that her power to adopt remained unaffected even after her father-in-law's death in spite of her having inherited the estate from her father-in-law: and in view of the decisions in *Ramji* v. *Ghamau* (8) and *Vithoba* v. *Bapu* (9) such a suggestion could not be made.

The recent decision of the Privy Council in *Yadao* v. *Namdev* (10) was not referred to in the argument, and its effect upon the view accepted by the Full Bench in *Ramji* v. *Ghamau* (8) may require to be considered hereafter. In the present case, however, the daughter-in-law inherited the property of her father-in-law and the question of her power to adopt thereafter stands on a different footing. The principle underlying the rulings in *Ram krishna* v. *Shamrao* (2) and *Datto Govind* v. *Pandurang Vinayak* (4) is not in any way affected by the observations in *Yadao* v. *Namdeo* (10).

I think, therefore, that the adoption of defendant No. 1 by Venkawa would not be valid.

It follows from these findings that

(1) (1905) 29 Bom. 410=7 Bom. L.R. 486.
(2) (1902) 26 Bom. 526=4 Bom. 315 (F.B.)
(3) A.I.R. 1918 P.C. 74=41 Mad. 855=45 I. A. 156 (P.C.)
(4) (1908) 32 Bom. 499=10 Bom. 692.
(5) (1876) 2 Bom. 388. (F.B.)
(6) (1880) 5 Bom. 110=3 Suther 795=4 Sar. 164 (P.C.) 7 I. A. 212.
(7) (1879) 4 Bom. 219.
(8) (1879) 6 Bom. 498 (F.B.)
(9) (1890) 15 Bom. 110.
(10) A.I.R. 1922 P.C. 216=49 Cal. 1=20 A. L.J. 481=42 M.L.J. 219=15 M.L.W. 595=26 C.W.N. 392=30 M. L. T. 83=24 B.L.R. 609 (P.C.)

defendant No. 1 has no title to the property in his own right.

It remains to consider the rights of the plaintiff, the defendant No. 2 and defendants Nos. 3 and 4 to this property. I may mention here that we are not concerned in this suit with the effect of the settlement said to have been effected by defendant No. 1 with defendants Nos. 3 and 4 and with defendant No. 2. Their rights *inter se* need not be considered here.

All these relations are undoubtedly *bandhus*: they are all within the limit specified in the Mitakshara beyond which the blood relationship cannot exist. A translation of the relevant passage is given in *Ramchandra* v. *Vinayak* (11). They are all *atma bandhus*. None of them is specifically mentioned in the Mitakshara or the Mayukha: and the only test to determine the heirship is propinquity to the propositus.

This is clear from the Mitakshara (see Mitakshara, Ch. II, Section VI—Stokes' Hindu Law Books, pp. 448 and 449). Whatever doubt there may have been at one time it is now accepted that the list of *bandhus* given in the text is merely illustrative and not exhaustive; nor does the list necessarily indicate anything more than this that the *atma bandhus* are to be preferred to the *pitri bandhus* and that the *pitri bandhus* are to be preferred to the *matri bandhus*.

It has been held by this Court in *Mohandas* v. *Krishnabai* (12) and *Parot Bapalal Sivakaram* v. *Mehta Harilal Surajram* (13) that propinquity is practically the sole test, and indeed in the first case the Court preferred an obviously nearer *atma bandhu*, not mentioned in the Mitakshara, to an *atma bandhu* specifically mentioned therein. The recent judgments of the Privy Council in *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (14) and *Vedachala Mudaliar* v. *Subramania Mudaliar* (15) place this point beyond controversy. The difficulty arises in the application of the test of propinquity.

I may also add here that the test of religious efficacy or the right to offer oblations is regulated by somewhat different considerations, and it does not necessarily afford any safe guide or useful assistance in determining the nearness of blood relationship in the case of distant relations such as we have in the present case.

It is strictly necessary to apply the test of propinquity, as best we can, to the specific relationships we have in this case Before dealing with this question, it will be convenient to deal with two general arguments that have been advanced in this case. It is contended on behalf of the plaintiff that defendant No. 2 is an adopted son, and cannot take the place of a natural son, so far as his right to inherit the property of his adoptive mother's ancestors is concerned, as it depends upon the blood relationship and that the fiction by which the adopted son takes his position as a natural son in the family of his adoptive father has not been carried so far in this Presidency in any of the reported cases and ought not to be applied to that extent.

The second argument urged on behalf of defendant No. 1 is that the plaintiff's suit must fail on the simple ground that as she is a female she is postponed to all male *bandhus* however remote, and the recent decisions of this Court in *Balkrishna* v. *Ramkrishna* (16) and *Girimallappa Channappa* v. *Kenchava* (17) have been relied upon in support of this argument.

As regards the first point I do not think that the argument can be accepted. In view of the decisions in *Uma Sanker Moitra* v. *Kali Komul Mozoomdar* (18) approved by the Privy Council in *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* (19), it is hardly open to the plaintiff to rely upon the earlier decision of the Calcutta High Court in *Morun Moee* v. *Bejoy* (20) or of the Madras High Court in *Chinnarama-*

(11) A.I.R. 1914 P.C. 1=42 Cal. 384=41 I.C. 290 (P.C.)
(12) (1881) 5 Bom. 597.
(13) (1894) 19 Bom. 631.
(14) A.I.R. 1921 P.C. 53=48 I.A. 86=40 M.L.J. 270=(1921) M.W.N. 153=19 A.L.J. 208=2 P.L.T. 97=14 L.W. 20=33 C.L.J. 266=29 M.L.T. 240=6 P.L.J. 140=25 C.W.N. 842=23 B.L.R. 692 (P.C.)
(15) A.I.R. 1922 P.C. 33=44 Mad. 753=48 I.A. 349=14 L. W. 402.
(16) A.I.R. 1921 Bom. 189=45 Bom. 353.
(17) A.I.R. 1921 Bom. 270=45 Bom. 768.
(18) (1880) 6 Cal. 256=7 C.L.J. 145=4 Sar. 458 (P.C.)
(19) (1883) 10 Cal. 232=10 I. A. 138.
(20) (1863) W. R. (F. B.) 121.

kristna Ayyar v. *Minatchi Ammal* (21). It may be as pointed out by Mr. Coyajee, that the point has not been decided by this Court or rather that there is no reported decision on the point; but the observations in *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (22), wherein the relevant passage from the Full Bench decision of the High Court at Calcutta is quoted, are sufficient to render the argument untenable.

The criticism of this view in Ghose's Hindu Law, Vol. I, p 655 (3rd Ed.), which purports to be based upon certain texts, has been relied upon by Mr. Coyajee. That criticism no doubt deserves to be considered; but it is hardly an open question now at least so far as this Court is concerned. At one stage of the argument I thought that there might be some force in the argument: but having regard to the clear decisions of the Privy Council to which I have referred, I do not think that it is permissible to us to treat it as an arguable point.

As regards the other question about ranking all female *bandhus* after the male *bandhus* it seems to me that the two decisions of this Court already referred to proceed upon a somewhat incomplete realisation of the position of the female *bandhus* in this Presidency, and do not give that effect to the test of propinquity which alone is to be determinative of the right to inherit in the case of distant blood relations.

In Madras no doubt all female *bandhus* are postponed in favour of the male *bandhus*. But in this Presidency the position of the famales has received a somewhat different treatment. For instance in the case of the widows of *sagotra sapindas* in this Presidency their right is recognised to an extent to which it is not recognised in any other part of India, governed by the Mitakshara law.

That, however, is the case of *sagotra sapindas* and may not be strictly relevant to the present point. The sister is given a place in this Presidency which has not been assigned to her in Madras or elsewhere: no doubt this is due to a large extent to the fact that she is expressly mentioned in the Vyavahara Mayukha and even though she is not mentioned in the Mitakshara she has been practically assigned by the decisions of this Court the same place after the grandmother as in the Vyavahara Mayukha. But the fact remains that a female in that position occupies such a high place among the heirs. Then the decision in *Saguna* v. *Sadashiv* (23) implies a negation of the general proposition that the female *bandhus* must come in after the male *bandhus*. The questions and answers in West and Buhler's Digest of Hindu Law, pp. 465, 466 (4th Ed.) relating to brother's daughter and sister's daughter do not support the general statement that the female *bandhus* can come in only after all male *bandhus* without any regard to the nearness of their relationship.

In short that view appears to me to be opposed to a fair application of the doctrine of propinquity which has been so far applied in this Presidency without giving any such general preference to the male *bandhus* over the female *bandhus*. I do not say that there is no preference of males over the females at all in determining the rights of the *bandhus*. The extent of the preference is not easy to define and has not been defined.

Speaking with some diffidence on a point of this difficulty. I think that except in the two recent rulings, the preference has so far never been stated in this Presidency to go beyond this, that, among *bandhus* of the same class, and of the same degree of nearness to the propositus in the same branch the males are preferred to females; for instance in the case of sister's son and sister's daughter, the son would be preferred to the daughter. But whether it is proper to go beyond that is a point which, in my opinion, requires consideration.

The basis of the rule enunciated in *Rajah Venkata Narasimha Appa Rao Bahadur* v. *Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur* (24) may be found in *Lakshmanammal* v. *Tiruvengada* (25). The view adopted in this decision has never been accepted in this Presidency as regards the relative position of the

(21) (1873) 7 M. H. C. R. 245.
(22) A. I. R. 1915 P. C. 41=40 Bom. 270=
(23) (1902) 26 Bom. 710=4 Bom. L.R. 527
(24) (1908) 31 Mad. 321=18 M.L.J. 409.
(25) (1882) 5 Mad. 241.

sister and her son. It is not necessary in this case to discuss the texts referred to in that case.

The result of adopting this view about preferring the male *bandhus* to the female *bandhus* generally would be to postpone some of the nearest female *bandhus* in favour of very distant relations. Even the son's daughter, who would be so near to the propositus, would be relegated to a very subordinate and distant position among the *bandhus* if she is to be postponed to all males; in competition with her own son, she would be postponed. Of course, whether this state of law would be anomalous or not is a matter open to argument but in this Presidency at any rate it would be considered anomalous.

In *Mohandas* v. *Krishnabai* (12) Melvill, J. observed as follows:—

"The plaintiff's mother, who is still alive, was a sister of Sunderlal's mother; and it may well be doubted whether the plaintiff would be entitled to succeed in preference to his own mother, through whom he claims."

This shows how this question has been looked at in this Presidency. No doubt if the rule as to giving preference to the male *bandhus* over female *bandhus*, apart from any consideration of propinquity, were adopted it would simplify matters considerably.

But I am humbly of opinion that that would not be in accordance with the Hindu law as understood and administered in this Presidency.

Without deciding this question of general preference of the male *bandhus* over the female *bandhus* and without reference to it, we can determine the question as to who is the nearest heir among the *bandhus* in this case, as between the plaintiff and defendants Nos. 3 and 4. I am inclined to take the view that the plaintiff would be the preferential heir. The sister's daughter is nearer to the propositus than the sister's son's son.

In West and Buhler's Hindu Law, in the questions and answers to which I have already referred, the opinion is expressed that a brother's daughter is to be preferred to the brother's daughter's son, and that the sister's daughter is nearer than sister's daughter's son. That, however, does not exactly meet the present case as the competition is with the sister's son's son. The case of the sister's son is mentioned in the same book at page 462. According to the opinion expressed there the sister's son comes after the sister but before the sister's daughter. It is based upon the old case of *Ichharam* v. *Parmanand* (26) and upon the fact that the sister's son is mentioned in the Nirnaya Sindhu. That leaves the question of the sister's son's son in relation to the sister's daughter open. If the sister's sons mentioned in the Nirnaya Sindhu can be interpreted as including the sister's son's son and not the sister's daughter, it may be said that the latter cannot be preferred to the former. But there is no justification for adopting such an interpretation.

Applying the test of propinquity it would seem that the sister's daughter would be nearer than the sister's son's sons. I do not, however, decide this question as it is not necessary to do so.

As between defendant No. 2 and defendants Nos. 3 and 4 the question presents no difficulty. The defendant No. 2 is nearer by one degree to the propositus and is in the line of descent. He is to be preferred to the defendants Nos. 3 and 4.

As between the plaintiff and defendant No. 2 the question is not easy. In order to appreciate the difficulty it is necessary to bear in mind not only the high position assigned to the sister as an heir in this Presidency but also the reasons for that view.

In order to have a clear idea of those reasons the judgments in the following cases may be perused with advantage :— *Vinayak Anandraw* v. *Lakshmibai* (27), *Sakharam Sadashiv Adhikari* v. *Sitabai* (28), *Kesserbhai* v. *Valab Raoji* (29), *Lakshmi* v. *Dada Nanaji* (30), *Malji Purshotum* v *Carsandus Natha* (31) and *Bhagwan* v. *Warubai* (32.)

Apart from the references to the views expressed in the Commentary known as Balambhatti on the Mitak-

(26) (1822) 2 Borr. 515.
(27) (1861) 1 Bom. H. C. 117
(28) (1879) 3 Bom. 353
(29) (1879) 4 Bom. 188.
(30) (1879) 4 Bom. 210.
(31) (19 0) 24 Bom. 563=2 Bom. L.R. 721.
(32) (1908) 32 Bom. 300=10 Bom. L.R. 889.

shara with which I shall deal separately as bearing on the point in question, it is clear that the position of the sister is largely due to the fact that the author of the Vyavahara Mayukha has assigned to her a special place, and the ground as stated by him when shorn of all technicalities is propinquity, as the texts of Manu and Brihaspati referred to by him go to show. (*See* Mandlik's Hindu Law, p. 81).

Under the Mitakshara though the sister is not mentioned by Vijnanesvara, practically the same position is assigned to her under the decisions of this Court. I may refer to the case of *Rudrapa* v. *Irawa* (33), which, like the present case, came from the Dharwar District.

The sister's position being thus established it is clear that in this Presidency she would be preferred to a son's daughter. The son's daughter can come in only as a *bandhu* as the decisions in *Venilal* v. *Parjaram*(34) and *Mulji Purushotum* v. *Cursandas Natha* (31) already referred to on a different point, would show.

I am not concerned with the merits of this position. But undoubtedly a sister is a preferential heir in relation to a son's daughter : and it may be argued that her issues should be preferred to the issues of the son's daughter. On the other hand, it may be urged that whatever the rights of the sister as against the son's daughter may be, the rights of these issues *inter se* should be determined solely with reference to their propinquity, that in the case of *bandhus* equally distant in degrees from the propositus those in the direct line of descent should be preferred to the *bandhus* among the collaterals in the ascending line, and that in the case of *bandhus* equally removed in degrees from the propositus a male be preferred to a female.

There is a third position which has been accepted by the lower Court, *viz.*, that the propinquity must be determined merely with reference to the degrees by which the *bandhus* are removed from the propositus, and that as the sister's daughter and the son's daughter's son are equally distant in that way they should take the property equally. As regards this last view no doubt it is recognised way of determining the nearness of relationship to see how far each is removed from the propositus, and in the absence of any other consideration justifying a differential treatment that would be the only means of determining it.

After a careful consideration of the position of the sister I do not think that the fact that she is preferred to the son's daughter as an heir affords any ground for preferring the sister's daughter to the son's daughter's son, though at one time I thought that, other things being equal, perhaps this might afford a ground for preference. But it seems to me that the position of the *bandhus* with whom we are concerned must be considered with reference to the propositus without any regard to the relative rights of their respective mothers.

I think, however, that in the case of *bandhus* equally removed from the propositus one in the direct line of descent should be preferred to one in a collateral line. I do not desire to generalise beyond the strict requirements of this case, but the son's daughter's son can be preferred as being a nearer *bandhu* to the sister's daughter, though they are both equally removed from the propositus. It is rather strange that there should be no precedent to guide us on a point of this character: at any rate I have not been able to find any, and none is cited to us. But I am satisfied that it affords a safe basis for differentiation between these *bandhus* as to their propinquity.

It is, therefore, not necessary to consider the question whether defendant No. 2 can be preferred to the plaintiff on the ground that he is a male and both being *atma bandhus* equally removed from the propositus. I think that out of all these *bandhus* the defendant No. 2 is the preferential heir.

I my add with reference to the Nirnaya Sindhu that so far as I have been able to ascertain none of the relations that we are concerned with is specifically mentioned as having any preferential right *inter se* to perform the *Shraddhas*. The passage relating to the sister's son is to be

(33) (1903) 28 Bom. 82=5 Bom. L.R. 676.
(34) (1894) 20 Bom. 178.

found in Nirnaya Sindhu, p. 273 (Nirnaya Sagar Press, 2nd Ed.). I have already stated my opinion that the expression sister's son, when read in relation to the context, cannot be understood as including the sister's son's sons; while speaking of the Nirnaya Sindhu it may be mentioned that the test of religious efficacy cannot help us in the case of such distant relations as we have in the present case.

As regards the Balambhatti, no doubt if the interpretation put by Balambhatta upon the word "Bhratarah" in the well-known text of Yajnavalkya were accepted the sister's daughter would come in not only before all *bandhus* but even before all the *gotraja sapindas*. A translation of the relevant passage has been given at page 306 and the list of heirs according to the scheme adopted in the Balambhatti is stated at page 308 of the report in *Bhagwan* v. *Warubai* (32).

Though Westropp, C.J. laid stress upon the Balambhatti as supporting the case for the sister in *Sakharam Sadashiv Adhikari* v. *Sitabai* (28), Jenkins, C. J. in *Mulji Purushotum* v. *Cursandas Natha* (31) and Chandavarkar, J. in *Bhagwan* v. *Warubai* (32) definitely rejected it as affording a basis for the sister's position in the list of specifically mentioned heirs and that view was followed in *Hari Annaji* v. *Vasudev Janardan* (35).

Apart from these decisions there is another difficulty in following the scheme in the Balambhatti logically. It would not be easy to determine what place would be assigned according to the Balambhatti to the son's daughter's son. For instance, in dealing with the position of the daughter's son, as stated in the Mitakshara, the author has interpreted the word *dauhitra* (daughter's son) as including *dauhitri* (daughter's daughter) (also see Gharpure's edition of Balambhatti, Vyavaharadhyaya, page 207) and he has given her a higher place than the sister and her issues.

It may be said that the same author would logically assign a higher place to the son's daughter and probably to her son. I may state that I have not been able to find in the Balambhatti any express reference to the son's daughter, or to the son's daughter's son in connection with the relative positions of different heirs.

So it is possible to argue that the sister's daughter occupies a higher position than the son's daughter's son according to the Balambhatti. The true view about this commentary on the particular point under consideration appears to me to be that the interpretation of the word *bhratarah* disturbs the settled series of heirs under the Mitakshara and it is difficult to base any inference upon that view unless we are prepared to accept the scheme in its entirety.

Though this commentary is useful as aiding the interpretation of the Mitakshara the views propounded therein cannot be accepted without due caution and examination. I do not think that the position assigned to the sister's daughter in the Balambatti can be properly accepted.

In the result I would set aside the decree of the lower Court and dismiss the plaintiff's suit.

Having regard, however, to the various contentions raised by the parties and the findings thereon and to all the circumstances, I would order each party to bear his or her own costs throughout. The plaintiff to pay to the Government the amount which she would have been required to pay as Court fees in the lower Court if she had not been allowed to sue as a pauper.

Macleod, C. J.—I agree with the conclusions of my learned brother, but I should like to add a few remarks of my own. Once the questions of fact have been decided there remains the contest between rival *bandhus*. It was first contended that the 2nd defendant could not inherit as a *bhandu* to the relations of his adoptive mother, but apart from the decisions in *Uma Sunker Moitro* v. *Kali Komul Mosumdar* (18) and *Kali Komul Mosoomdar* v. *Uma Shunkur Moitra* (19) it would seem strange if an adopted son having left his natural family were to be considered as the son of his adoptive father only and not of his adoptive mother.

(35) (1914) 38 Bom. 438=16 Bom. L. R. 283.

As the 2nd defendant then must be recognized as the son's daughter's son of Venkaji, it follows that the defendant No. 3 as sister's grandson is one more degree remote, and the interesting question whether he would be preferred to the sister's daughter need not be decided. There remains then the plaintiff, sister's daughter, and defendant No. 2, son's daughter's son, both *atma bandhus* three degrees removed from Venkaji.

The learned Judge has decreed that they should take the suit property equally. Though some may think that this Court in deciding that all male *bandhus* should be preferred to female *bandhus* without regard to propinquity has gone too far, still there is no authority for the proposition that *bandhus* of different sex but of equal propinquity should take equally. It may be even noted that amongst those relations who have been held to be *bandhus* in decided cases as detailed in Mr. Gharpure's book on Hindu Law at p. 315 there is only one female, the father's sister who, it was held in *Saguna* v. *Sadashiv* (23), should be preferred to the mother's brother, and that decision must now be considered as virtually overruled by the decision of the Privy Council in *Vedachala Mudaliar* v. *Subramania Mudaliar* (15) as their Lordships have expressed their disapproval of the preference given by the decisions of the Madras High Court to *bandhus* on the father's side over *bandhus* on the mother's side.

I think, therefore, the 2nd defendant should be preferred to the plaintiff. But apart from the question of sex there is another very interesting question which has not been considered, and which does not seem to have arisen in any reported case. The direct descendants of the propositus through daughters though they are *bandhus* are not cognates. Even if paternal cognates are not to be preferred to maternal cognates it might plausibly be argued that direct descendants should be preferred to both.

I for one must regret that the principles with regard to the inheritance of *bandhus* cannot be laid down more definitely, instead of it being left to their being discovered by a process of exhaustion as occasion arises for a decision between rival claimants.

Decree set aside.

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A. I. R. 1922 Bombay 329

MACLEOD, C. J. AND COYAJEE, J.

R. S. Potphode and others—Defendants-Appellants.

v.

J. G. Yeshwantrao and others—Plaintiff and Defendants—Respondents.

S. A. No 564 of 1921 decided on 13th Feb. 1922 from a decision of D. J. of Ratnagiri in A. S. No. 29 of 1920.

(a) *Khoti Settlement Act, S. 21 and Ss 16 to 20—'Decision', meaning of—Mere entry in Botkhat is not a 'decision'.*

The Act nowhere provides that the mere entry in the settlement register of the name of a particular person as the occupant of the survey number is either final and conclusive or that it is binding upon all the parties concerned, unless and until it is reversed or modified by a decree of the Civil Court. What is made binding by the provisions of S. 21 is the decision of the Recording Officer and not a mere entry of a person's name in the Settlement Register. Preceding sections make it clear that the mere entry of the name of some particular person as occupant was not intended to be included among those decisions of the Recording Officer. An entry in Botkhat is not a decision. S. A. No. 850 of 1914 Ref. [P. 331, C. 1.]

(b) *C.P.C. S. 100—New plea.*

New plea cannot be raised for the first time in second appeal. [P 331, C 2.]

A. G. Desai—for Appellants.

P. B. Shingne—for Respondents.

Judgment:—The plaintiff in this case and the 12th defendant are *khots* of Mouza Kosamb in the Ratnagiri District. The defendants Nos. 1 to 11 are members of a family named Potphode. The plaintiff brought the suit, which has given rise to this appeal, to recover possession of lands comprised in survey No. 269 *Falni* No. 4, alleging that he was the owner thereof, that they formed part of his *Khoti Khasgi* estate, and that the Potphode defendants had unlawfully dispossessed him of the same.

The 3rd defendant was the only party who contested this claim in the trial Court. He denied the plaintiff's title and possession as alleged, and asserted that the said lands belonged to and were continuously enjoyed by members of the Potphode family.

He further contended that the suit lands were entered in the village *Botkhat* in the name of some members of his family, that the plaintiff did not get such

entry reversed or modified by the decree of a competent Court within the period prescribed by law, and that therefore the entry had become binding upon the plaintiff.

The first two issues framed by the trial Court related to the questions whether the plaintiff had proved his title and possession within the 12 years preceding the commencement of this suit. The third issue was whether the said entry in the *Bhotkhat* was a "decision" within the meaning of Section 21 of the Khoti Settlement Act 1880 so as to give finality against the plaintiff and what would be its effect.

The learned Judge held that the plaintiff had satisfactorily established his title and also his possession within the 12 years immediately preceding the suit, and that the entry in the *Botkhat* was not such a "decision" as was contemplated by Section 21 and was therefore not binding upon the plaintiff. He therefore granted the reliefs claimed in the plaint.

From that decree an appeal was preferred to the District Court, not by the 3rd defendant, but by defendants Nos. 2, 9 and 10 who until then had taken no part in the proceedings. The appeal however failed, the learned Judge recording his complete agreement with the findings made by the trial Court.

The original defendants Nos. 2, 3, 9 and 10 have now brought this appeal here and it is contended on their behalf that the entry in question has become binding upon the plaintiff according to the provisions of the said Section 21.

For the determination of this question it becomes necessary to examine the material provisions of Sections 16 to 21 which come under Part III of the said Act.

Section 16 provides that the Settlement register prepared under Section 108 of the Bombay Land Revenue Code 1879, shall show whether a particular Survey number is held by a privileged occupant or not; and, if it is held by one or more privileged occupants, then the said register shall further specify (1) the tenure; (2) the names of the occupants and (3) in the case of land held by a permanent tenant whether his interest therein is transferable otherwise than by inheritance or not. In this case the entry in question does specify the names of some members of the Potphode family as the occupants of the suit lands. By Section 17 it is provided that the other records prepared under the said Section 108 shall specify the description and amount of rent payable to the khot. These two sections (16 and 17) are headed "Settlement records."

Sections 18 to 21 fall under a different heading: "Custody and Amendment of Records: Determination of Disputes." Section 18 deals with the custody and amendment of the Settlement register; and here I do not overlook Sub-section (3) (*e*).

Then Section 19 (1) enacts that "If it appears to the Recording officer that there exists any dispute as to any matter which he is bound to record or as to any amendment proposed to be made under Section 18, he may, either on the application of any of the disputant parties or of his own motion, investigate and decide such disputes and frame or amend the settlement-register or other record accordingly." It is only when a dispute arises as to any matter which the Recording officer is bound to record that he proceeds to "investigate" it in the manner provided in sub-section (2); as a result of such investigation he arrives at his "decision" and he has then to "frame or amend the settlement-register or other record accordingly," i.e. to make an *entry* in accordance with the result of his *decision*.

Section 20 enacts that entries recording (1) certain facts regarding the interest of a permanent tenant, or (2) the liability of a privileged occupant to pay rent, shall be "conclusive and final evidence of the fact or liability so recorded."

Lastly it is provided by Section 21 that "in any other matter "the decision of the Recording officer shall be binding upon all the parties affected thereby until reversed or modified by a final decree of a competent Court.

It becomes clear then that, these being the only sections bearing on the questions, the Act nowhere provides that the mere entry in the settlement Register of the names of a particular

person as the occupant of the survey number is either final and conclusive or that it is binding upon all parties concerned unless, and until it is reversed or modified by a decree of the Civil Court.

In support of his contention Mr. Desai who has presented the appellant's case with care and ability, appeals to the provisions of Section 21. But what is made binding by those provisions is the *decision* of the Recording Officer and not a mere *entry* of a person's name in the settlement-register. As observed by Scott, C.J. in second appeal No. 850 of 1914.

"It seems to us quite clear that the word 'decision' refers to a determination of a dispute either in the presence or not in the presence of parties such as is referred to in Section 19".

And as there, so in this case "there is no indication that any such dispute had arisen for the decision of the Recording officer."

In *Bhiva* v. *Balu* (1) Hayward J. interpreted Section 21 thus

"Now that the section makes conclusive certain decisions of the officer defined as the Recording officer what those decisions are is to be gathered from the preceding sections and a perusal of these preceding sections seems to me to make it clear that the mere entry of the name of some particular person as occupant was not intended to be included among those decisions of the Recording Officer".

I am of the same opinion. The Act does not invest a mere entry such as we have, with any degree of finality; and much could be said in favour of the view that the legislature has deliberately refrained from giving to it that effect. Mr. Desai has however urged that the proviso to Section 21 favours his contention.

But it seems to me that the expression 'such decision or entry" occurring there means no more than "such decision or the entry which is the result of such decision. Reference may in this connection be made to the material words in Section 19 (1) which are that "the Recording Officer may investigate and decide such dispute, and frame or amend the Settlement register accordingly."

(1) (1919) 43 Bom. 469=51 I. C. 7=21 Bom. L. R. 350.

Finally it was contended for the appellants that the entry in question may be regarded as a "decision" of the Recording Officer based upon a consent of all parties affected thereby. The argument derives no support either from the language of Sections 19 and 21 or from the decisions referred to above. It is however sufficient to say that this contention was not placed before the lower Courts and it cannot therefore be allowed to be raised here for the first time in this second appeal.

I would for these reasons affirm the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

A.I.R. 1922 Bombay 331.

MACLEOD, C. J. AND SHAH, J.

Gotu Ram Radha Kishan—Plaintiff-Appellant.

v.

Barku Dhodu—Defendant-Respondent.

S. A. No. 215 of 1921 decided on 30th September 1921 from the decision of the Asst. J., Khandesh. in A. No. 407 of 1919.

Civil P.C O. 23, R. 3—Agriculturist—Defendant admitting claim—Dekkhan Agriculturists' Relief Act, S. 12.—Application of—Is not barred.

Where a compromise is entered into and the defendant admits the whole of the plaintiff's claim and asks the Court to pass a decree in accordance with that admission, Order 23, Rule 3 does not oust the jurisdiction of the Court under S. 12, Dekkhan Agriculturists' Relief Act. The Court can go behind the transaction, and is not bound to pass a decree.

[P. 333, C. 1.]

B. G. Rao—for Appellant.

W. B. Pradhan—for Respondent.

Macleod, C. J. :—The plaintiff sued to recover on a promissory note, dated 29th December 1915, Rs. 450, principal, and Rs. 139-8-0 for interest. The defendant admitted the promissory note but denied consideration and prayed for an account and instalments. This defendant is an agriculturist.

When the suit came on for hearing what was represented as a compromise was presented to the Court, under which the defendant agreed that he should pay the amount demanded, Rs. 589-8-0, and the costs by instalments of Rs. 100 each. In default of paying any two instalments the whole amount was to be recovered at once; interest at four annas per cent. per mensem was to run on the principal amount from that date

until all the instalments had been paid off.

The defendant was examined by the Court and said:—

"I have made the settlement, which I have understood, (and which) I admit. A decree may be passed according to it. At first I received Rs. 200 (two hundred) thirteen years ago. No receipt is passed showing what amount is paid. I do not remember. I do not understand accounts; therefore I have agreed to this settlement."

The Court passed the following order:—

"Defendant is not able to say how much is due to plaintiff. He has no precise knowledge as to the Wasul paid. The transaction is very old. I cannot in these circumstances allow the compromise as I do not believe that defendant has entered into it after fully understanding his rights."

The learned Judge then went into the merits of the case and came to the conclusion that no consideration had been paid to the defendant for the promissory note in suit.

That decision on appeal was confirmed. The learned Judge said:—

"I think that the lower Court was perfectly justified in this case in disallowing the compromise (Exhibit 18) as it was no compromise in fact at all; the defendant had disputed the amount of the claim in this case (Exhibit 11). When he was examined by the Court he distinctly stated that he had received no consideration at all under the pro-note in suit, whereas plaintiff's case was that he had paid a cash consideration of Rs. 450 at the time of the execution of the pro note by the defendant in the presence of the writer, Damoo. In spite of this position of things we find defendant entering into a compromise admitting the whole of the plaintiff's claim and agreeing to pay the whole amount with all costs, and I fail to see how this can be called a compromise at all which on the very face of it is conspicuous for total absence of any mutual concessions in the matter."

He agreed with the finding of fact that no consideration had been paid.

We have been referred to four decisions of this Court on the question whether the Court can go behind a compromise entered into between the parties when one of them is an agriculturist, and whether the Court was bound to pass a decree under what is now Order 23, Rule 3, provided the provisions of the rule have been complied with. In *Gangadhar Sakhram* v. *Mahadu Santaji* (1) it was held that where a matter had been referred to arbitration, with the intervention of a Court of justice, by parties, one of whom was an agriculturist, and an award had been made thereon, any person interested in the award might, without obtaining the conciliator's certificate, apply for the filing of the award under Section 525 of the Code of Civil Procedure of 1882, the provisions of which were not superseded by Section 47 of the Dekkhan Agriculturists' Relief Act. Mr. Justice West said

"The Code of Civil Procedure and the Dekkhan Agriculturists' Relief Act being within the territorial range of the latter statutes in *pari materia* must be construed together so as to give effect, so far as possible, to the provisions of each. Another general principle is that exceptional provisions are not to receive a development to all their logical consequences contrary to the general principles of the law. When these principles are applied, there is nothing to be found which prevents parties from resorting to friendly arbitration instead of to the Court, or to prevent the filing and if need be the enforcement of an award thus obtained."

In *Piraji* v. *Ganapati* (2) a decree had been passed by the lower Court in terms of the compromise. On appeal to the High Court the decree was confirmed. But Mr. Justice Chandavarkar said:

"What the Court was asked to do was not indeed to pass a decree on any admission of the defendant, but to make one in terms of the compromise which, after trial commenced, had been deliberately entered into by the parties. A compromise means the settlement of a disputed claim."

In *Kishandas Shivram Marwadi* v.

(1) [1883] 8 Bom. 20.
(2) [1910] 34 Bom. 502=6 I.C. 527 =12 Bom. L.R. 378.

Nama RamaVir (3) the parties proposed certain terms to the Court and asked for a decree, but the terms were at variance with section 15 B of the Dekkhan Agriculturists' Relief Act, and the Subordinate Judge referred the question to the High Court whether he could pass a decree in such terms although the parties asked him to do so, and it was held that it was not competent to the Court to pass a decree in terms which were at variance with section 15 B.

In *Shivayagappa* v. *Govindappa* (4) a question arose with regard to the execution of a decree passed in accordance with the terms of a compromise and, as it appeared to the Bench before whom the question came for decision that the decisions in *Piraji* v. *Ganapati* (2) and *Kishandas Shivram Marwadi* v. *Nama Rama Vir* (3) were conflicting, the question was referred to a Full Bench and the question which had been referred was construed by the Full Bench as referring to the special provisions of S. 15 B, which were the only special provisions referred to in the statement of the case.

The effect of the decision was that if there was a compromise made by parties who were *Sui Juris* it should be given effect to, and that the fact that the decree was not in accordance with the provisions of Section 15 B did not make it unlawful.

It will be seen, therefore, that none of these decisions touch the question whether the provisions of Order XXIII, Rule 3 prevent the Court from going behind the transaction when the defendant admits the whole of the plaintiffs claim and asks the Court to pass a decree in accordance with that admission.

I do not think myself it can be said that Order XXIII, Rule 3 ousts the jurisdiction of the Court in this class of cases from inquiring into the nature of the admission so as to satisfy itself whether the admission is true and made by the debtor with a full knowledge of his legal rights as against the creditor. If when the case had been called on the defendant said "I admit the claim and am willing that a decree should be passed against me accordingly" it is perfectly obvious that under Section 12 of the Dekkhan Agriculturists' Relief Act the Court would be bound to record in writing its conclusions as to whether the admission was true and made by the debtor with a full knowledge of his legal rights, and it seems to me to make no difference that before he came to Court the defendant has written down a paper to that effect and produces it in Court when the case is called on.

I think myself, therefore, that provided it is perfectly clear that the whole of the plaintiff's claim is admitted the Court can go behind the transaction even though an application is made to record an agreement under Order XXIII, Rule 3. In this case the evidence shows that the defendant signed a promissory note without receiving any cash so as to admit his liability for a certain old transaction of the nature of which he seems to have been entirely ignorant.

I consider, therefore, that the decree dismissing the suit was right and the appeal should de dismissed with costs.

Shah, J : —I concur in the order proposed. I have felt some difficulty in coming to this conclusion because it seems to me that according to the decisions of the Court the provisions of Order XXIII, Rule 3, wherever they are applicable, must be given effect to even in cases which are governed by the Dekkhan Agriculturists' Relief Act.

The principle has been sufficiently recognised in *Gangadhar Sakharam* v. *Mahadu Santaji* (1), *Piraji* v. *Ganapati* (2) and *Shivayagappa* v. *Govindappa* (4). In spite of the observations in *Kishandas Shivram Marwadi* v. *Nana Rama Vir* (3), which conflict with that view, I think that the Court would be bound even in cases governed by the Dekkhan Agriculturists' Relief Act to give effect to the provisions of Order XXIII, Rule 3.

Thus in any suit where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by a lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and pass a decree in accordance therewith so far as it relates to the suit.

(3) (1910) 35 Bom. 190 = 8 I.C. 651 = 12 Bom. L. R. 1024.

(4) (1913) 37 Bom. 614 = 20 I.C. 969 = 15 Bom. L. R. 763.

The question, however, that arises on the special facts of this case is whether the nature of the agreement between the parties is within the scope of Rule 3 of Order XXIII. In substance the defendant in the present case, who is an agriculturist has admitted the whole of the claim by the agreement in question. I say this in spite of the fact that there is a provision in the agreement as to the payment of the amount by way of instalments

I do not desire to lay down any general proposition that such an agreement would never fall within the scope of Rule 3, in cases governed by the Dekkhan Agriculturists' Relief Act. But having regard to the facts of this case, and the view taken by the lower Courts that substantially the defendant admitted the whole of the claim it seems to me that it was an admission of the claim within the meaning of section 12 of the Dekkhan Agriculturists' Relief Act. The application of that section is not necessarily excluded in such a case. If in spite of the provisions of Order XXIII, Rule 3, the application of section 12 is not excluded, it would be open to the Court under the provisions of that section to consider whether the debtor has made the admission with a full knowledge of his legal rights as against the creditor, and unless the Court is satisfied on that point, the Court would not be bound to accept the admission of the debtor, but would be at liberty to inquire into the case as required by that section.

In the present case on the evidence the Courts have found that the debtor admitted the claim without full knowledge of his legal rights, and that finding must be accepted in second appeal as a finding of fact. The whole question which has presented difficulty to my mind is whether in view of the adjustment of the claim between the parties the application of section 12 of the Dekkhan Agriculturists' Relief Act was not excluded in virtue of the provisions of Order XXIII, Rule 3.

But on the special facts of this case, as I have said, it does not seem to me that the application of that section was necessarily excluded. If that section applies it is clear that the conclusion reached by the lower Courts is really a conclusion based on the circumstances and the evidence in the case which must be accepted

Decree confirmed.

A.I.R. 1922 Bombay 334.

MACLEOD, C. J. AND COYAJEE, J.

Dattatraya Mangeshya Chikaramane—Plaintiff—Appellant.

v.

Venkatesh Vasudeo Parabhu and others—Defendants—Respondents.

S. A. No. 472 of 1921 decided on 9th March 1922 from the decision of the D. J., Kanara, in Appeal No. 142 of 1919.

C. P. C. O. 34, R. 1—*Mortgage Suit—Purchaser of equity of redemption, not Party—Purchaser in execution of mortgage decree cannot dispossess him.*

Where the purchaser of the equity of redemption (*e.g.*) purchaser in execution of money decree) is not made a party to the mortgage suit, the purchaser of the property in execution of mortgage decree, who merely stands in the shoes of the mortgagee, cannot claim to dispossess the purchaser in execution of money-decree, and his suit, like that of the mortgagee is barred. 2 M. L. J. 290 ref. and dist. [P. 335, C. 1.]

G. P. Murdeshwar—for Appellant.

Nilkanth Atmaram—for Respondents.

Judgment—This was an appeal from the decision of the District Judge of Kanara setting aside the decree of the trial Court in favour of the plaintiff. The facts are as follows. One Narayanrao was the owner of the *Mulgeni* rights of the suit property. In 1890 he mortgaged his *Mulgeni* rights to Laxmibai. In 1899 a creditor got a money decree against Narayanarao, and in execution his *Mulgeni* rights were sold to the defendant's predecessor. Clearly what could have been sold then was the equity of redemption. Luxmibai in 1905 brought a suit on her mortgage.

A decree was passed and in execution the *Mulgeni* rights were sold by the Court to the heirs of Luxmibai, who sold in 1917 to the present plaintiff. The predecessor of the defendant, the owner at the time of the equity of redemption was not a party to the mortgagee's suit. But he was in possession and when the plaintiff as a purchaser went to get possession, the persons actually cultivating the land

refused to give possession or pay rent to him. Consequently the plaintiff brought this suit.

Now the possession of the purchaser at the sale by a mortgagee in execution of the decree in a suit brought by him on his mortgage, the owner of the equity of redemption not being a party to the proceedings, is not the possession of an owner of all interests in the property. He buys subject to the equity of redemption, and therefore by virtue of his purchase only steps into the shoes of the mortgagee. So what was purchased by the auction-purchaser in 1912 was only the mortgage rights of Luxmibai, since the owner of the equity of redemption was not a party to the suit. If the purchaser had obtained possession the position might have been different. But not being in possession, he was bound to take proceedings to obtain the benefit of his purchase, and he cannot get possession unless he has that right as a successor to the original mortgagee, Luxmibai. Luxmibai would be clearly barred from bringing a suit to obtain possession or have the property sold to realize the mortgage amount, and the result must be that the plaintiff is equally barred.

We have been referred to the decision in *Muthia Chetti* v. *Subbayyan* (1) where no doubt the facts were very similar to the facts in this case, and it was held there that the plaintiff's suit ought not to be dismissed but the defendant should be allowed the option of redeeming within the time to be fixed by the Court, and in case of his failure to do so, the plaintiff would be entitled to recover possession. But that case was decided in 1892 at the time when it was thought that a mortgagee out of possession had 60 years wherein to file a suit on his mortgage. Therefore that case cannot be considered as authority which will assist us in deciding this case.

I think, therefore, the decision of the learned Judge was right and the appeal must be dismissed with costs.

Appeal dismissed.

(1) (1892) 2 M. L. J. 290.

A. I. R. 1922 Bombay 335

MACLEOD, C. J. AND SHAH, J.

Ganu Gopal Sonar—Applicant-Appellant

v.

Datta'rayn Laxman Potdar—Defendants-Respondent.

App. No. 198 of 1921 decided on 12th April 1922 from a decision of D. J., Satara in Mis. App. No. 7 of 1916.

Guardians and Wards Act (VIII of 1890), S. 24—Marriage of Minor—Application by guardian for sanction—Should be disposed of on merits.

Sanction by the Court to the marriage of the minor on the application of the certificated guardian of the minor should not be refused simply on the opposition of a relative without dealing with the guardian's proposal on the merits. [P. 335, C. 2.]

A. G. Desai—for Appellant.

K. V. Joshi—for Respondent.

Judgment:—This is an application by the certificated guardian of the minor for the sanction of the Court to the marriage of the minor. The opposition is raised by the step-brother of the minor and the learned Judge seems to have given effect to that opposition by refusing sanction without dealing with the guardian's proposal on the merits.

We do not think that that is the right view to take as once the guardian is appointed under the Guardians and Wards Act any application for the marriage of the minor by the guardian must be considered from the point of view of benefit to the minor, and any relation that might be entitled to be heard on the application will be heard, but such opposition must be considered at its true value and cannot be considered as an absolute bar to the Court giving sanction to the marriage.

The case must therefore go back to the District Court and the District Court must consider whether in the absence of any proposal of the step-brother, the bridegroom proposed by the guardian is a suitable person. If the step-brother makes counter-proposals then the Court will consider them. But whether the Court is considering the proposals of the guardian or whether it is considering the proposals of the step-brother, it must always have before it, in the first place, the welfare of the minor.

So the appeal must be allowed and the case sent back to the District Court.

Appeal allowed and case remanded.

A. I. R. 1922 Bombay 336 (1)

MACLEOD, C. J. AND COYAJEE, J.

Sunder Bai—Defendant-Appellant.

v.

Dwarkadas Parpia.—Plaintiff-Repondent.

App. from Original decree No. 126 of 1921, decided on 1st February 1922.

Specific Relief Act (I of 1877), S. 26 Illus. (b) —Variation as a defence—Evidence to prove variation can be let in—Evidence Act. S. 92.

Where specific performance is asked for, the law provides that plaintiff must do equity and extends the provisions of the Evidence Act by giving the defendant opportunity to prove the variation set up. [P. 336, C. 1,]

Ranganekar, S. R. Parulekar and *R. G. Gupta*—for Appellant.

P.B. Shingne—for Respondent

Judgment:—We think in this case the evidence which the defendant wished to lead to show what was the real agreement between the parties ought not to have been disallowed. The plaintiff was suing for specific performance of a written contract and to such a suit Section 26 of the Specific Relief Act applies. The defendant has set up a variation namely that the consideration was Rs. 5,500 plus the right of residence in certain rooms; and she alleges she signed the agreement on the understanding that that was the consideration which was mentioned in the contract.

The Judge has found, presumably from examination of the parties after issues had been raised, that this agreement actually was made. But evidence must be led by the Defendant to prove what she alleges. Illustration (*b*) to Section 26 of the Specific Relief Act appears to be applicable to the case without having recourse to the provisions of Section 92 of the Evidence Act, because where specific performance is asked for, the law provides that the plaintiff must do equity and extends the provisions of the Evidence Act by giving the defendant an opportunity to prove a variation which he sets up.

The appeal must be allowed, the decree of the lower Court set aside and the case remanded to the lower Court to take evidence and decide on the issues which have been raised.

Appeal allowed and case remanded.

A. I. R. 1922 Bombay 336 (2).

MACLEOD, C. J. AND KANGA, J.

Jaishingrao Madharao Ranu—Defendant-Appellant

v.

Venkatarao Satwajirao Bhosle and others—Plaintiffs-Defendants.

Appeal from original decree No. 5 of 1915 decided on 23rd March 1922 from the decree of Sub. J. dated 17th August 1918 in Suit No. 349 of 1915, Belgaum.

Civil P C., (V. of 1908), Ss. 2 and 97—Deccan Agriculturists' Relief Act, S. 15—Decision that plaintiff is an agriculturist is not a preliminary decree.

A finding on an issue whether a party to a suit was an agriculturist prior to taking accounts under the provisions of Deccan Agriculturists' Relief Act is not a preliminary decree within the meaning of sections 2 and 97 of C. P. C. 39 Bom. 422=A.I R. 1921 Bom 220 Foll. [P. 337, C 1.]

S. R. Parulekar for *A. G. Desai*—For Appellant

K. N. Koyaji—for Respondent. No. 1.

Judgment.—The plaintiff sued as an agriculturist for an account under Section 15 D of the Deccan Agriculturists' Relief Act with regard to a possessory mortgage dated 4th November 1912. Various defences were raised by the defendants and on the pleadings all the issues should have been raised.

Unfortunately one issue was raised :—"Is the plaintiff an agriculturist." That was treated as a preliminary issue on which a decision was given by the learned First Class Subordinate Judge on the 17th August 1918 in favour of the plaintiff.

Unfortunately again, a decree appears to have been drawn up on that finding, and an appeal was admitted in this Court on the 12th June 1919. At that time the decision in *Municipal Committee of Nasik* v. *Collector of Nasik* (1) was published.

But unfortunately that decision does not appear to have been sufficiently understood, and it was not until the decision in *Dattatraya* v. *Radhabai* (2) that it was definitely decided that a finding on an issue

(1) (1915) 39 Bom. 422=28 I. C. 589 =17 Bom. L. R. 324.

(2) A. I. R. 1921 Bom. 220=45 Bom. 627.

whether a party to a suit was an agriculturist, preliminary to taking of accounts under the provisions of the Deccan Act, was not a preliminary decree within the meaning of Sections 2 and 97 of the C. P. Code of 1908. There is no decree therefore, and consequently no appeal.

The case must go back to the Court of the Subordinate Judge in order that the remaining issues shall be framed and then the trial can proceed. The appeal will be dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 337 (1)

MACLEOD, C. J. AND COYAJEE, J.

Chikko Bhagwant Nadgir and others—Plaintiffs.

v.

Chikko Nilkantha Nadgir—Defendant.

S. A. No. 499 of 1921, decided on 9th Feb., 1922 from D. J., Dharwar in Appeal No. 217 of 1919.

Limitation Act, Art. 140—Starting point—Time runs from date of death of life-interest owner.

Even where the remainder man is in possession on behalf of the holder of a life interest, limitation begins only when the holder of the life interest dies. [P. 337, C. 2.]

R. A. Jahagirdar—for Appellants.

Nilkanth Atmaram—for Respondent.

Judgment.:—The suit lands were in the ownership of two brothers Khando and Guddo, who in 1882 assigned them to their mother Nagubai by a registered deed for her maintenance. In 1883 a creditor obtained a money decree against Guddo and attached these properties in execution. Nagubai applied to have the attachment raised but for some reason her application was rejected. Bhagwant who had been in the meantime adopted by Khando also raised objection to the attachment and that application was granted. In the end only the right, title and interest of Guddo was sold by the Court and purchased by one Nilkanth who however took possession in 1885 of the entire lands now in suit and his family had been in possession ever since. In 1887 Bhagwant brought two suits to recover possession of his half share in the two survey numbers but Nilkanth denied his title and those suits were withdrawn. Bhagwant died in 1903 and Nagubai died in 1907.

The present plaintiffs are the sons and grandsons of Bhagwant and they filed this suit on the 21st March 1918 to recover possession from the descendants of Nilkanth of the half share which they say belonged to Bhagwant. Their suit was decreed in the trial Court but was dismissed in appeal as barred by limitation on the ground that Bhagwant was entitled to sue immediately for possession, time was running against him since Nilkanth got possession of the property.

But the learned Judge seems to have omitted to notice that under the deed of 1882 Nagubai was a life-tenant, while Bhagwant and Guddo would be the remainder men and under Article 140 of the First Schedule of the Limitation Act a remainder-man would have 12 years from the date the remainder fell into file a suit against a person endeavouring to challenge his title by adverse possession.

It is attempted to meet this argument by asserting that Bhagwant was in possession in 1885 before Nilkanth got possession, and therefore time had begun to run already against him. But even the appellate Judge seems to think that Nagubai was in possession and that Nilkanth took possession of the property from her tenants. The only ground we have for thinking that Bhagwant was in possession was his statement before the Mamlatdar, Exhibit 36, dated 31st May 1886. We doubt whether it is safe to place any reliance on that statement standing by itself.

We are entitled to consider that Nagubai having been granted these lands for her maintenance was in possession and that if Bhagwant took possession, he would do so on her behalf. It cannot be said that there is any equity in the case in favour of the defendants since they must have known that they were purchasing only the interest of Guddo. In spite of that they took possession of the whole property and have been enjoying the profits ever since.

The appeal therefore must be allowed and the decree of the trial Court restored with costs throughout. *Appeal allowed.*

A. I. R. 1922 Bombay 337 (2)

MACLEOD, C. J.

Bapuji Rustomji Kerawalla—Plaintiff.

v.

Haji Esmail Haji Ahmed—Defendant.

O. C. J. S. No. 1591 of 1921, decided on 2nd July 1921.

Will—Construction—Bequest to nephew for life and afterwards to such persons as the nephew may, by deed or will appoint—Bequest conveys absolute estate.

The clause in a testator's will, provided that the legatee, his nephew, could not either sell or mortgage the house, and that, after the decease of the said nephew, the house should be received by such persons and in such manner and in such proportions as the said nephew might, by his will or by any deed or writing whatever, appoint and, if he should not have made his will or a deed or writing as stated above, the said house was given in gift after his decease to his children in equal shares. Plaintiff, the legatee, entered into an agreement to convey an absolute estate to the defendant. Defendant contended that plaintiff had no marketable title to convey an absolute estate. Plaintiff therefore took out an originating summons.

[P. 338, Col. 1 & 2.]

Held, the donee took an absolute estate and the restraint on alienation must be considered as having no effect so as to detract from the gift of the absolute estate. In spite of the words of restraint the nephew was empowered to appoint by deed or writing in his life time to himself and therefore he had the power to convey the absolute estate. The plaintiff could either convey direct to the defendant and so give him a good title or he could first appoint to himself and then convey. [P. 339, C. 1 & 2.]

Gupte—for Appellant.

Billimoria—for Respondent.

Macleod, C J.—By an agreement dated 14th February 1920 the plaintiff agreed to sell to the defendant in the name of his nominee, Haji Sulleman Salley Mahomed, two properties belonging to the plaintiff described in the schedule to the agreement. One of these premises was situate at Chandanvadi. A dispute has arisen between the parties as to whether the plaintiff has made out a marketable title to the said property at Chandanvadi.

The property belonged to one Behramji Dadabhai Pochkhanawalla, who died in Bombay on or about the 28th of June 1895, having, prior to his death, duly made his last will and testament, dated the 2nd April 1895. By clause 12 of the said will the testator gave to his nephew Bapuji Rustomji Kerawalla, the plaintiff in this case, for his life-time, this Chandanvadi house. The testator directed that the said nephew should, out of the rents of the said house, defray all the expenses for doing repairs thereto and pay the bills for assessment thereof and should appropriate to his own use the nett amount of rent.

The clause further provided that he could not either sell or mortgage the house, and that, after the decease of the said nephew, Bapuji Rustomji, the house should be received by such persons and in such manner and in such proportions as the said nephew might by his will or by any deed or writing whatever appoint, and if he should not have made his will or a deed or writing, as stated above, the said house was given in gift after his decease to his children in equal shares.

The plaintiff was required by the defendant to explain under what power he proposed to convey absolutely to the purchaser the Chandanvadi property. He was also required to state whether the power of appointment given to him as aforesaid had been at any time exercised by him or not, and if so, in whose favour and by what deed.

The vendor replied that he proposed to convey the property to the purchaser by way of appointment, or, in other words, he proposed to exercise the power of appointment by the said deed and that he had once exercised the power by an indenture of mortgage dated 19th September 1917 which was still subsisting. Afterwards the mortgagees reconveyed the said property and all interest therein to the plaintiff by a deed of reconveyance dated the 23rd December 1920. On the same day, by a deed of appointment, the plaintiff appointed to himself all the interest in the said property save and except his life-interest therein with intent that the life-interest should merge in the remaining interest in the said property and that the whole of the said property should belong to him and his heirs absolutely.

The plaintiff when taking out the originating summons submitted the following questions for determination:—(1) Whether a conveyance by the plaintiff to the defendant of the Chandanvadi property mentioned in the plaint is not a sufficient compliance with clause 4 of the agreement for sale of the said property by the plaintiff to the defendant; and (2) if not, what other acts and documents should the plaintiff execute to enable him to convey the said property absolutely to the defendant.

Under the construction of clause 4 of the will a question arises whether there was a gift to the nephew for his life with a testamentary power of appointment or whether the nephew was also given a general power of appointment, in which case he would have an absolute interest. No doubt the words in clause 12 "after the decease of my said nephew" tend to show that the testator intended that the nephew should only have a life-interest

with a power of appointment added to it. But I think it was not realised that a power defined by the words of clause 12 or similar words would be sufficient to convey an absolute estate, since, when there is a power to appoint by deed or writing, that necessarily implies that the power can be exercised during the life of the donee.

In *Barford* v. *Street* (1) there was a devise and bequest of real and personal estate in trust to pay the rents, &c., to the separate use of a married woman for life, and after her decease to convey according to her appointment either by deed or writing or by last will and testament. The Master of the Rolls said (p. 139) :—

"What do you contend to be the nature and extent of her interest.. An estate for life with an unqualified power of appointing the inheritance comprehends everything. What induced me at first to doubt was the indication of an intention in the codicil, that the estate should remain in the trustee for the life of the plaintiff, with powers to her, inconsistent, in a great degree, with the supposition of her having, or being able to acquire, the absolute interest. But I do not think I can by inference from thence control the clear and express words, by which the power is given to the devisee to dispose of this estate in her life time by any deed or deeds, writing or writings, or by her last will and testament. How can the Court say, that it is only by will that she can appoint? By this unlimited power she can appoint the inheritance. The whole equitable fee is thus subject to her present disposition."

In *Irwin* v. *Farrer* (2) there was a bequest to trustees of money in trust to lay out the money in stock, the dividends as they came due to be paid to A for life, and after her decease to pay the principal according to her appointment by will or otherwise. It was held that A had an absolute power of disposition, and her bill was held a sufficient indication of her intention to take the whole by some document other than a will.

In *Archibald* v. *Wright* (3) the testator directed that after his wife's death part of his stock should be transferred to Johanna for her sole and entire use during her life, that she should not alienate it but enjoy the interest during her life, and that at her decease she might dispose of it as she thought fit. A question then arose what were the rights of Johanna under the bequest? Whether Johanna took an absolute interest for life with power to dispose by will or whether the words "she might dispose of as she thought fit" also gave power to dispose of the stock? Did these words give Johanna an absolute interest or did the words imposing a restraint on alienation during her life show an intention that Johanna could only have power to dispose of the stock by her will? The Vice-Chancellor, in answer to the argument of counsel as to restraint on alienation, said :—

"That may be, so far as it is a limitation of the interest, but it appears to me available as indicative of an intention to prescribe the mode of executing the power *viz.*, by will and not by writing *inter vivos*. I think this lady was not to have a power to alienate during her life; and if not, then she took a life interest, coupled with a testamentary power of appointment, and having died intestate, *Henrietta Ann Wright Place* is entitled to . . annuities in the pleadings mentioned."

This particular case falls exactly between the two cases in Vesey on the one hand, and the case in 9 Simons on the other. There was a clear intention on the part of the testator that his nephew should not sell or alienate the property during his life-time. On the other hand there was an equally clear intention that the nephew should have the power to appoint by deed or writing as well as by will, so that the donee took an absolute estate, and the restraint on alienation must be considered as having no effect so as to detract from the gift of the absolute estate. I think, therefore, in spite of these words of restraint in clause 12, the nephew was empowered to appoint by deed or writing in his life-time to himself and therefore he has the power to convey the absolute estate.

The result must be that to the first question the answer is that the plaintiff can either convey direct to the defendant

(1) (1809) 16 Ves. 135=33 E. R. 935.
(2) (1812) 19 Ves. 86=34 E. R. 450.
(3) (1838) 9 Simons 161=7 L. J. (N. S.) Ch. 20=59 E. R. 320.

and so give him a good title or he can first appoint to himself and then convey. The second question is unnecessary in view of the answer to the first question.

Costs costs in the sale.

Answer accordingly.

A. I. R. 1922 Bombay 340.

MACLEOD, C. J.

Abdul Hussein Essufalli—Plaintiff.

v.

D. J. Mistri & Co.—Defendants.

O. C. J. S. No. 1312 of 1918 decided on 24th September 1921.

Civil P. C., Ss. 55 (4), and 145—Proceedings against surety—Court has discretion to refuse to make an order in favour of judgment-creditor.

If the security has been realised under an order of the Court under section 55 (4) or in the first instance consists of a cash deposit, the judgment-creditor may ask the Court to execute the decree under section 145 against the money lying in Court. But the Court may, in exercise of its discretion, refuse to make an order in favour of the judgment-creditor.

[P. 341, C. 1.]

Jinnah—for Defendants.

Taraporevala—for Surety.

Judgment:—The defendants in Suit No. 1312 of 1918 have taken out this summons as decree-holders on the counter-claim filed by them in the above suit, for an order that the surety bond given by one Hosseinbhai Heptulla for the appearance of the plaintiff before the Chamber Judge on the 31st March 1921 should be escheated and that the sum of Rs 2,000 should be realised by the Prothonotary and paid to the defendants, as the said Hosseinbhai Heptulla had failed to produce the plaintiff in Court on such day. The plaintiff was arrested at the instance of the defendants and produced before the Judge in Chambers on the 15th March, when he asked for time that he might file his petition under the Insolvency Act.

Accordingly the order was made that he should appear before the learned Judge on the 31st March, and as security, for his applying to be declared an insolvent and for such appearance the aforementioned Hosseinbhai Heptulla deposited with the Prothonotary Rs. 2,000 which was to remain with the Prothonotary as security.

It may be noted that under Section 55 (4) of the Civil Procedure Code the judgment-debtor should give security not only that he will apply to be declared insolvent but also that he will appear when called upon in any proceeding upon the application, so that the security should continue until a final order is made upon the petition.

The plaintiff failed to appear on the 31st March before the Chamber Judge. When that happens, under Section 55, Sub-section (4) of the Civil Procedure Code, the Court may either direct the security to be realised or commit the judgment-debtor to the civil prison in execution of the decree. A direction that the security should be realised seems unnecessary, as the judgment-creditor can proceed in execution against the surety under Section 145 of the Civil Procedure Code, thus dispensing with the necessity of filing a separate suit. The actual order made by the Chamber Judge on the 31st March was to direct the plaintiff to be re-arrested and committed to jail. Section 145 of the Code directs that where any person has become liable as surety, *inter alia*, for the fulfilment of any condition imposed on any person under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him to the extent to which he has rendered himself personally liable in the manner therein provided for the execution of decrees.

In *Basanti Lal* v. *Chhedo Singh* (1) one Cheddo Singh stood surety for the production of one Chhedi Halwai, who, on filing an application for insolvency, was ordered to be released from the civil jail. As the surety failed to produce Chhedi on the date on which he was directed to produce him, the security was forfeited. The decree-holder prayed that the amount should be forfeited to him, basing his claim on Section 145 of the Civil Procedure Code. The District Judge refused that application and declared that the money should be forfeited to Government.

On appeal it was held that there was no power in the Court to declare a forfeiture in favour of the Government. The surety contended that his suretyship did not extend beyond the pendency of the insolvency proceedings, but as he had not appealed from the order adjudicating upon this point adversely to him, the Court directed that the

(1) [1912] 39 Cal. 1048=16 I. C. 118=16 C. W. N. 664.

sum of Rs. 500 should be paid to the decree-holder, to this extent executing the decree against the surety.

If the security has been realised under an order of the Court under Section 55 (4) or in the first instance consists of a cash deposit, as in this case, the judgment-creditor may ask the Court to execute the decree under Section 145 against the money lying in Court. But the Court may in exercise of its discretion refuse to make an order in favour of the judgment-creditor.

Now, the debtor has sworn that he came to the Court, but did not know where to find the Chamber Judge, and when after moving from Court to Court he found himself at last in the right place, he was told that the Chamber work was over and an order had been made for his arrest. Whether that story is true or not, there is no doubt that he had so far fulfilled the condition on which he was allowed to be released on the 15th March by filing his petition in the Insolvency Court, and if he had issued notices to the creditors, he would be able to apply to the Insolvency Court for a protection order on the 5th April.

And taking it at the most that the surety was guilty of great carelessness in not seeing that the plaintiff was guided to the proper place where he would find the Chamber Judge, I think he will be sufficiently punished by having to pay his costs of this summons, which will otherwise be discharged. The moneys can be re-paid by the Prothonotary.

I think the proper order is that each party do pay his own costs.

Summons discharged.

A. I. R. 1922 Bombay 341.

MACLEOD, C. J. AND COYAJEE, J.

Jamasji Hormasji Bahadurpurwala and *another*—Plaintiff and Defendant No 2—Appellants.

v.

Jamsetji Hormasji Bahadurpurwala and others—Defendants-Respondents.

F. A. No. 146 of 1917 decided on 3rd March 1922 from an order of the 1st Class Sub. J., Broach, in Suit No. 43 of 1913.

Administrator—Will providing for reasonable expenses of marriage—Spending ¼ of estate is unreasonable—Decree against administrator as heir—Payment of decree must be given credit to in accounts.

Where the administrator without the authority of the Court allowed ¼ of the estate for the marriage of a girl although the direction of the testator was that all marriage expenses should be paid out of the estate ;

Held **: what was meant was that reasonable expenses should be paid ; and ¼ of the estate was unreasonable.** [P. 341, C. 2.]

Where an administrator is sued along with another as heirs for a valid debt and payment is made by him, credit must be allowed for that amount in accounts of administration, [P. 342, C. 1.]

B. J. Desai and *K. N. Coyajee* — for Appellant.

Bahadurji and *G. N. Thakor*—for Respondents.

Judgment :—This is a first appeal arising in Original Suit No. 43 of 1913. It was a suit filed by the plaintiffs to whom Letters of Administration of the estate of one Hormasji Hiraji had been granted for the administration of the suit property by ascertaining the right, title and interest therein of the parties. The Judge has made a list of the properties distributable among the heirs of the deceased Hormasji. He has also declared the shares to which the different sharers are entitled, and has given various other directions.

In this appeal we are only concerned with two contentions raised by the plaintiffs, first, with regard to the expenses of the marriage of Alabai, the daughter of Jamsetji, and secondly, with regard to the amount paid by the plaintiffs as Administrators to one Framji, alleged to be a creditor of the deceased.

The learned Judge has only allowed Rs. 4,000 out of Rs. 10,910, for the actual expenses of Alabai's marriage and although the testator directed that all the marriage expenses should be paid out of the estate, we do not think the Administrator was entitled without the authority of the Court to spend for Alabai's marriage practically 1/3rd of the estate, and we are quite sure that that was never intended by the testator when he drew his will. What he meant was that all reasonable expenses should be paid, and 1/3rd of the estate was unreasonable. If the plaintiffs wished to pay so much, then they ought to have sought the direction of the Court with the consent of the other party concerned.

With regard to Rs. 7,000 which the

plaintiffs claimed to be allowed in their accounts as having been paid to Framji who filed a suit against Jamasji and Jamsetji as the heirs of Hormasji, the Judge has disallowed the amount of Rs. 7,000 which was paid by Jamasji in settlement of Framji's claim. It is true that the testator said in his will that he had no debts. But Framji did produce accounts of dealings between himself and the deceased; and it is difficult to believe that those accounts were fictitious.

We do not think it is suggested that there were no dealings whatever between Framji and the deceased, and as the suit was filed against both the sons as his heirs, Jamsetji was perfectly well aware that the suit had been settled by the payment of Rs. 7,000. It would have been better if Jamasji had got entered in the terms of settlement that Rs. 7,000 were to be paid out of the estate of the deceased. But as he was sued as an heir, and as he was an Administrator, it would equally follow that the money paid in settlement would be coming out of the estate of the deceased. Jamsetji took no exception to the settlement. He was only concerned to get his costs on the ground that he had unnecessarily been made a party.

The other sharers in the estate had not disputed this payment; and although the question did not actually fall to be decided in certain proceedings which were taken by the 1st defendant for a revocation of the Letters of Administration, the lower Court did go into this question, and the Commissioner and the Judge found that the debt was due by the deceased. We are perfectly well aware that on appeal to the High Court the learned Judges then said that the question with regard to this Rs. 7,000 was perfectly open, and we have dealt with it as such, but it is certainly pertinent to remember that in 1913 when this question was before the Commissioner and the lower Court, they considered that the payment was justified.

We think, therefore, that with regard to Rs. 7,000 the appeal must be allowed and the plaintiffs must be allowed credit for that amount in their accounts. The case must go back then to the lower Court for the order to be amended in accordance with our judgment. The parties to pay their own costs of this appeal.

Appeal allowed in part & Case remanded.

A. I. R. 1922 Bombay 342.

MACLEOD, C. J. AND COYAJEE, J.

Shankar Lal Tapidas—Plaintiff-Appellant.

v.

Bajikhan Akhtyarkhan — Defendant Respondent.

F. A. No. 71 of 1921 decided on 21st Feb. 1922 from the decision of the D. J., Broach, in suit No. 2 of 1918.

(a) Gujarat Talukdari Act, S. 31—Talukdari land—Mortgage of, is void.

Where mortgaged land was entered by the Talati in Register of Inam Vanta lands a few months before the suit as vanta land but no village account of long standing was forthcoming to prove that it was vanta land and not Talukdari and the mortgagor was a Talukdar, and his estate was taken over for management by Talukdari Settlement Officer under that Act:

Held the mortgaged land was Talukdari land, and the mortgage on the death of the Talukdar was void.

(b) Land Tenure—Vanta tenure.

Vanta tenure is prescription of remote antiquity without any deeds or grants."

[P. 343, C. 2.]

G. N. Thakor—for Appellant.

Government Pleader—for Respondents Nos. 2 to 7.

Judgment.—The dispute in this case relates to a plot of land forming part of Survey No. 354 situated within the limits of the village of Gajapura. The area of Survey No. 354 is about 5700 acres, and it belongs to the Thakore of Amod. On the 16th May 1905, Chhatrasang Fattehsang of Amod mortgaged the land now in question to the 1st defendant for a sum of Rs. 799. On the same day the 1st defendant transferred this interest of his, together with other properties, to the plaintiff by way of *San* mortgage. Chhatrasang, the mortgagor, died in the year 1907, and it is stated in the plaint in this suit that some time after his death, the management of the estate was taken over by the Talukdari Settlement Officer.

The plaintiff instituted this suit in the District Court of Broach to recover possession of the said land, alleging that the Talukdari Settlement Officer purporting to act under the provisions of the Bombay Land Revenue Code, (Bom. Act V of 1879) dispossessed them in May 1907.

The said officer is joined as the 7th defendant, and it is alleged in the plaint that he is holding under his own management the estate inherited by the

defendants Nos. 2 to 6 from their father Chhatrasang.

The 1st defendant did not put in appearance. The defence of defendants Nos. 2 to 6, which is adopted by the 7th defendant, is that on the death of Chhatrasang, the mortgage in question became void under the provisions of Section 31 of the Gujerat Taluqdars' Act, and that, therefore, it was competent to the Taluqdari Settlement Officer to summarily evict the plaintiff under the powers conferred on the said Officer by Section 79-A, clause (a) of the Bombay Land Revenue Code as modified by Section 33, Sub-section 2 (cc) of the Gujarat Taluqdars' Act.

On these pleadings the District Judge raised an issue in these terms—Whether under Section 31 of the Talukdari Act the mortgage made by the father of defendants 2 to 6 in 1905 became void after his death in 1907. The finding of the learned Judge on that issue was in the affirmative.

This finding is now challenged in appeal before us. It is urged on behalf of the appellant, original plaintiff, that the lands in question are *Vanta* lands, and that they do not form part of a "*Talukdari* estate" within the meaning of that expression in Section 31 of the Gujarat Talukdars' Act. As pointed out in the *Talukdari Settlement Officer* v. *Chhaganlal Dwarkadas*: (1) the words "Talukdar's estate" in Section 31 are used in a technical sense limited to the Talukdar's interest in the estate held by him by reason of his status as a Talukdar.

Now it cannot be disputed that the Thakor of Amod enjoys the status of a Talukdar. In the plaint it is clearly alleged that on the death of Chhatrasang Fattehsang his estate was taken over for purposes of management by Talukdari Settlement Officer. This obviously could only have been done under the provisions of Sections 26, 27 or 28 of the Gujarat Talukdars Act. It is also stated by the plaintiff's witness Purushotam Moreshwar that the defendants Nos. 2 to 6 are Talukdars; this statement is allowed to stand unchallenged.

But it is urged on behalf of the plaintiff that the lands in question are *Vanta* lands, and that they are not held on the *Talukdari* tenure. The only justification for this contention lies in the fact that Survey No 354 is shown in the Register of *Inami Vanta* lands prepared so recently as in the *Samvat* year 1972. That register was prepared by Purushottam Moreshwar, a *Talati* under the Thakore of Amod. He is examined in this case as a witness on behalf of the plaintiff. He says

"The area of Survey No 354 is about 5700 acres. This survey number belongs to the Thakore Saheb of Amod. There is the register about the numbers. This register gives the details of this number. This register shows *Inami Vanta Lands*. It was prepared in my time in *Samat* 1972, and I have prepared it. The lands in Survey No. 354 are vanta lands. Gajapura is a part of Amod. This land is *Udhar Jamabandi*. When the estate of the Thakore Saheb was with the Talukdari Settlement Officer then this Survey No. 354 was given a *Talukdari* number. The Thakore Saheb of Amod is a Talukdar. Defendants 2 to 6 are members of the family of Thakore Saheb and they are Talukdars. The Survey No. 354 is mentioned as *Vanta* in our register but in the Government Register it is shown as *Sirkar Udhar Jamabandi*. As it pays *Udhar Jama* we call it *Vanta*. There is no other reason for calling it *Vanta*. I have prepared this register according to my understanding. I do not know what *Vanta* means. I call the lands of the Thakore Saheb as *Vanta* lands. There is no other reason. I have not made any enquiry as to the nature of the tenure of Survey No. 354."

It is not shown by the production of village accounts of long standing, or otherwise, that the land in question is *Vanta*. The entry in the inam Register prepared by Purshottam a few months before the institution of this suit is of no value; for he admits that he does not know what "vanta" means The meaning of that word is explained by Sir Michael Westropp in *Dolsang Bharsang* v. *Collector of Kaira* (2) and Prof. Wilson in his Glossary says of *Vanta* "The tenure is prescription of remote antiquity without any deeds or grants."

The learned pleader for the appellant was not instructed to explain in what

(1) (1911) 35 Bom. 97 = 8 I.C. 604 = 12 Bom. L.R. 903.

(2) (1880) 4 Bom. 367

respect the tenure of the lands in suit are differed from Talukdari tenure. No facts shown to exist which would enable the Court to hold that they do not form a part of a "Talukdar's estate." On the materials placed before him the District Judge has come to the conclusion that the said lands are held on Talukdari tenure and form part of a "Talukdar's estate." He has given his reasons in support of his finding. It is unnecessary to repeat them. It may be that one or another of these, taken singly, may not be quite convincing. But we are satisfied that upon the evidence adduced in this case his conclusions are right and that there is no sufficient reason why they should be disturbed in appeal.

I would, therefore, dismiss the appeal and affirm his decree with costs.

The appellant's pleader brings it to our notice that his client has obtained a decree against the 1st defendant in respect of the transactions which have taken place between them in the year 1905: and also that he may have other claims against the said defendant arising out of the said transactions.

It is clear, however, that our decision will have settled nothing as to matters falling outside the scope of the present suit.

Appeal dismissed.

A. I. R. 1922 Bombay 344.

MACLEOD, C. J. AND SHAH, J.

Bandra Municipality—Defendant—Appellant.

v.

John C. De Mello— Plaintiff—Respondent.

S. A. No. 410 of 1921 decided on 13th April 1922 from the Joint J, Thana, in App. No. 104 of 1920.

Bombay Municipal Act, S. 145-A—Permission to build on old wall—Pulling down the wall and rebuilding it—Municipality cannot withhold permission.

Plaintiff wanted to build another storey on his western wall, and got permission. According to a compromise in a dispute with his neighbours he agreed to pull down the old wall on which he was going to build and to build further back. The Municipal Committee objected to this. The plaintiff therefore began to follow out his old plan. The Municipality again objected.

***Held*: the objection was factious. The Municipality was not entitled to object to the rebuilding of the old wall where it stood with the addition to which it had given permission.** [P. 344, C. 2.]

Government Pleader—for Appellant.

H. C. Koyajee (and B. W. Desai)—for Respondent.

Judgment:—The plaintiff is the owner of a house within the limits of the Bandra Municipality. He asked for permission to build another storey on his western wall, and permission was given. Then he had a dispute with his neighbour which was compromised, with the result that he agreed to build further back, and so he pulled down the old walls on the top of which he was going to build.

The Municipality then objected to his building according to the compromise at which he had arrived with his neighbour. So the plaintiff determined to follow out the first plan with which he had started and to rebuild on the old foundation of the western wall. The Municipality then objected to that on the ground that he had not permission to build there and that under bye-law 145-A if he wanted to erect a building it would have to be 10 feet away from the boundary.

It seems to me that this objection to the plaintiff's building was somewhat, as the Municipality had no objection in the first instance, factious to the plaintiff raising his wall, although it was within 10 feet of the boundary. It has been contended that as the plaintiff pulled down his old wall he can no longer avail himself of the permission granted to increase the height of the old wall. But we do not think on the merits that the Municipality is entitled to object to plaintiff's rebuilding his wall as it originally stood with the addition for which they had already given permission.

We think, therefore, that the appeal should be dismissed with costs.

The cross-objections are dismissed with costs.

Appeal dismissed.

Cross-objections also dismissed.

A. I. R. 1922 Bombay 345 (1)

MACLEOD, C.J. AND COYAJEE, J.

Radhabai Bhaskar Sakharam—Defendant No. 4-Applicant.

v.

Anant Pandurang Pandit and another—Plaintiff and Defendant 1-Opponents.

Civ. Application No. 144 of 1921 decided on 7th Feb, 1922 from the order of the Sub. J., Thana in suit No. 83 of 1919.

Civil P.C. O. 9, R. 7—Ex parte *order—Party appearing before hearing is entitled to be heard.*

Until a suit is actually called on, a party is entitled to appear and defend. It may be that he is guilty of delay and if that is the case he may be mulcted in costs. But if he does appear before the suit is heard, then he has a right to be heard. [P. 345, C. 1.]

D. G. Dalvi—for Applicant.

P. B. Shingne—for Opponents.

Judgment.—We do not understand the procedure followed in this suit. It appears that there was some uncertainty whether the 4th Defendant was served with the summons or not. The Judge made an order that the case should proceed against her *ex parte* when the 4th defendant actually appeared in Court and asked for this order to be cancelled, notice was issued to the plaintiff and the applicant was then examined and she explained how it came to pass that she was not aware of the suit having been filed against her. But the Judge did not believe what was said and dismissed her application, directing that the case should go against her *ex parte*.

We do not know under what provisions of the Code the Court made this order pending the hearing of the suit. Until a suit is actually called on, a party is entitled to appear and defend. It may be that he is guilty of delay and if that is the case he may be mulcted in costs. But if he does not appear before the suit is heard then he has no right to be heard. Rule absolute. Costs costs in the cause.

Rule made absolute.

A. I. R. 1922 Bombay 345 (2)

MACLEOD, C. J. AND SHAH, J.

In re Pana Lal Ganeshdas.

O. C. J. decided on 26th Sep. 1921.

Income Tax Act (1918), S. 51—Case disposed of by Revenue authority—Application for reference thereafter, cannot be made.

An application to the Chief Revenue Authority to refer a question to the High Court under S. 51 must be made in the course of assessment, and before the disposal of the case.

Coltman—for Petitioners.

Bahadurji—for Chief Revenue Authority.

Macleod, C. J.:—This was a rule granted to the petitioners, the firm of Panalal Ganeshdas, calling upon the Chief Revenue Authority, Bombay, to appear and show cause why he should not refer a certain question mentioned in the petition to the High Court with his opinion.

The Advocate General has taken a preliminary point that the request to the Chief Revenue Authority to refer the question at issue for the opinion of the High Court was made long after the assessment had been made, and therefore it does not come within the provisions of Section 51 of the Indian Income Tax Act. That, we think, is a perfectly good point.

It is clearly intended by S. 51 that the application by the assessee to refer a question must be made in the course of the assessment, before the case is disposed of. Sub-section (3) says that the High Court should send to the Revenue Authority a copy of its judgment deciding the question raised, and then the Revenue Authority should dispose of the case accordingly, or, if the case arose on reference from any Revenue Officer subordinate to it, should forward a copy of such judgment to such officer who shall dispose of the case conformably to such judgment.

Clearly, then the application must be made before the case is disposed of, and it cannot be left to the assessee once the assessment is made and the case is disposed of, to fix his own time for making an application to the Chief Revenue Authority to refer a question under Section 51.

The petition, therefore, must be rejected on this point.

Rule discharged.

A. I. R. 1922 Bombay 346.

MACLEOD, C. J. AND SHAH, J.

Tukaram Bhau Dhas and others—Appellants.

v.

Ganpat Anandrao Dhas—Respondent.

S. A No 316 of 1921 decided on 10th April, 1922 from the decision of Asst. J., Sholapur in Appeal No. 69 of 1920.

Hindu Law—Alienation—Consent of reversioner to one sale cannot validate another sale

The consent of presumptive reversioners to one sale of property by the widow does not preclude the reversioners who are alive when the reversion falls in though they may be the sons of the reversioners, from disputing the want of legal necessity for another sale of the property by the widow. [P. 346, C. 2.]

P. B. Shingne—for Appellants.

K. A. Padhye—for Respondent.

Macleod, C.J.—This appeal discloses a very curious state of facts. Gangabai, the widow of one Bapu sold on the 28th of January 1908 to her brother the Defendant the suit land which had previously been mortgaged to one Daulatram in 1899. Out of the consideration of Rs. 1,000 paid by the defendant Rs. 250 had already been received by Gangabai; Rs. 250 were to be paid to the mortgagee and Rs. 500 were to be paid to her at the time the sale-deed was registered.

Events happened which induced Gangabai to evade the defendant and eventually on the 31st March 1908 she passed another sale deed to one Nana Krishna for Rs. 1,000 and that was consented to by Bhau and Govind at that time representing the whole body of the next reversioners. Nana the 2nd vendee obtained possession of the land and so the defendant filed a suit in 1910 against Gangabai, Nana and the heirs of the mortgagee and paid Rs. 750 the balance of purchase money into Court.

The result of that suit was that the defendant succeeded. Nana got back Rs. 750 which the defendant had paid into Court. Since then the defendant remained in possession of the land until on Gangabai's death, Bhau and Govind having previously died, their sons the plaintiffs brought this suit.

The issues in the trial Courts were whether there was justifying necessity for the suit sale; and whether the ratification deed passed by plaintiff's father in favour of one Nana could affect the merits of the case These issues were found in the negative by the trial Judge and a decree was passed in favour of the plaintiffs.

In appeal, although the learned Judge found that as the consent of Bhau and Govind did not relate to the defendant's sale-deed such consent could not validate it, if it was void for want of legal necessity, still he seemed to think that the present plaintiffs had no title because even if the sale to defendant was without legal necessity, yet the sale to Nana which was consented to by the reversioners would be binding, and he and his heirs would be entitled on the death of Gangabai to the remainder. I do not think we are entitled to go so far as that. The view that I take as far as this suit is concerned, is that as between the defendant and Gangabai, Nana lost all rights to the suit property by the decree in the suit of 1910, and Nana not being a party to this suit, the present defendant is not entitled to take advantage of the sale deed so as to suggest in some way that the present reversioners are disputing the consent which was given to it by their father.

As between the plaintiffs and the defendant the sole question is whether the sale by Gangabai to the defendant was for legal necessity. The fact that Bhau and Govind were willing that Gangabai should sell the property to Nana appears to me to be quite irrelevant on the questions now before the Court as between the plaintiffs and the defendant. If it was a question between the plaintiffs and Nana, it might very well be that the plaintiffs would be bound by the consent of their fathers.

But it seems to me far too remote to rely upon the consent of Bhau and Govind to the sale by Gangabai to Nana as raising any presumption in favour of the defendant that the prior sale to him was for legal necessity. Th decree therefore must be set aside and the

case must go back to the lower Appellate Court for a decision on the issue whether the sale by Gangabai to the defendant was for legal necessity in the light of the remarks in this judgment. The Appellants are entitled to the costs of the appeal.

Shah, J.—I agree.

Decree set aside, & case remanded.

A. I. R. 1922 Bombay 347.

MACLEOD, C. J. AND SHAH, J.

Y. N. Kulkarni—Plaintiff-Appellants

v.

Laxmibai Keshco Gopal — Defendant-Respondent.

F. A. No. 486 of 1920 decided on 3rd April 1922 from the decision of 1st Class Sub. J. of Satara in C. S. No. 115 of 1919.

(a) *Hindu Law—Adoption-Widow succeeding as Gotraja sapinda cannot make a valid adoption so as to affect the reversioner's rights.*

A Hindu widow who succeeds to an estate, not her husband's, but as a gotraja sapinda of the last male holder in consequence of the absence of nearer heirs, cannot make a valid adoption. It cannot be said therefore that the decision of High Court, that a widow of a gotraja sapinda cannot adopt so as to defeat the rights of the reversioners has in any way been shaken by the decision in *Yadho* v. *Namdeo*. (A.I.R. 1922 P. C. 216.)

[P. 349, C. 2.]

If the widow of a predeceased son of plaintiff's paternal uncle from whom he was separate though she took a life estate as a widow of a gotaraja spinda, had no power to adopt so as to defeat the rights of the plaintiff as the reversioner then the widow of a grandson of plaintiff's uncle (who was not the last male-holder) who in the lifetime of her husband's uncle's widow had only a right of maintenance, had no power to adopt so as to exclude the reversioners.

[P. 350, C. 1]

(b) *Evidence Act, S 35—Death Register—Prepared during times of Epidemic—Not of much value to prove order of death.*

Where the Death Register was prepared while the Epidemic of plague was raging, *held* that it is probable that the Offi ials would be fully occupied and the information they received with regard to births and deaths would not be accurately recorded, and that no great value should be placed on the entries therein as to the actual date of death [P. 348, C. 1 & 2.]

(c) *Evidence Act, S 114—Death, Order of—Older man must be presumed to have died first.*

Where two persons, one aged 18 and the other 60 are found to have died on the same day, but it is not clear as to who died last, A Court is entitled to say that the probabilities are in favour of the younger man surviving the elder.

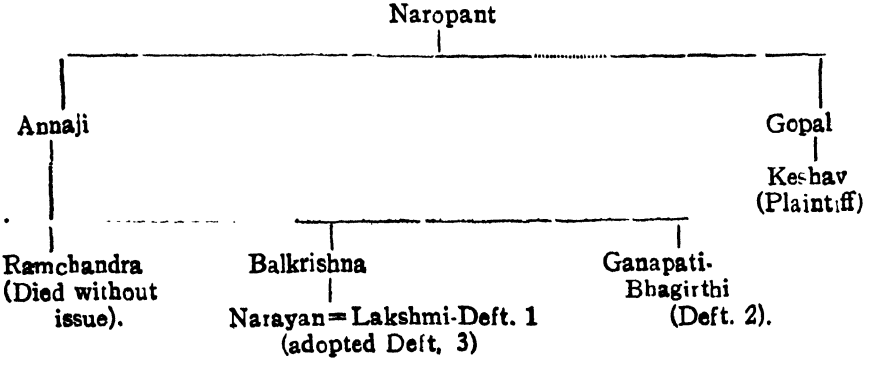
[P. 348, C. 2.]

K.N. Kayaji—for Appellant.

Nadkarni and *P. B. Shingne*—for Respondent.

Macleod, C. J.—The plaintiff claiming to be the heir of one Ramchandra sued for declarations (1) that defendant 3 was not adopted by defendant 1 and that if he was adopted, the adoption was invalid, (2) that the sale-deed passed to defendant 4 by defendants 1 to 3 was not binding on the plaintiff.

The following pedigree will explain the relationship of the parties :—



Annaji died in the first half of 1899 leaving him surviving his son Ramchandra, his grandson Narayan by a predeceased son Balkrishna and Bha

girthibai, the widow of a predeceased son Ganapati. Ramachandra and Narayan died on the 1st of November 1899. If Narayan survived Ramchandra then he would be the last male holder of the family property, and his widow Lakshmibai would have taken a widow's estate. In 1915 she adopted the present defendant 3.

The plaintiff who was a separated nephew of Annaji filed this suit in 1919 against Lakshmibai, Bhagirthibai, the 3rd defendant and the 4th defendant, an assignee from the 3rd defendant. He contended that the property belonged to his cousin Ramchandra; that on Ramchandra's death Bhagirathi as the widow of Ganapati, a *gotraja sapinda*, succeeded, while Lakshmi had only a right to maintenance, and had therefore, no right to adopt the 3rd defendant.

The learned Judge who decided the case unfortunately did not see the witnesses as the evidence was recorded by his predecessor; therefore in dealing with the question of fact he was in no better position than we are, as we have the same written record before us as the learned Judge. He came to the conclusion on the evidence that Ramchandra died last. The evidence of Exhibit 53 and Exhibit 55 supports the story that Ramchandra died last, while the evidence of Exhibits 61, 62, 64, 66 and 67 supports the defendants' case. It must be remembered that all these witnesses were talking of what happened 20 years ago, and all of them were likely to make mistakes quite honestly. But the plaintiff placed great reliance on the village Death Register which showed that Narayan died on the 1st November and Ramchandra on 2nd November.

Now it is admitted that both of them died on the 1st, one early in the morning, the other in the afternoon, and the evidence of the defendants' witnesses shows that they were both cremated on the same day, so that in any event the Register is incorrect. I do not see any reason why the Court should attach such importance to the Register as to hold that what it states must be absolutely correct. When a village has been attacked by an epidemic of plague, it is probable that all the officials would be fully occupied, and it may very well be that the information they received with regard to births and deaths would not be accurately recorded.

On a careful perusal of the evidence, therefore, I do not see any reason why we should believe the witnesses for the plaintiff rather than the witnesses for the defendants, while I may point out that one of the witnesses, Exhibit 55, for the plaintiff actually went so far as to say that Ramchandra died at least two days after Narayan.

Thereafter the name of Lakshmibai was entered in the Vatan Register, but the suggested explanation of the preference given to her is not sufficiently convincing. It is just as probable that Lakshmi was considered by the authorities to be the rightful heir as the widow of the last male holder, as that the daughter-in-law of the senior son was preferred to the widow of the junior son. It seems to me, therefore, that as we are in the same position with regard to the appreciation of evidence as the learned Judge, there is no sufficient reason for holding on the evidence that Ramchandra died last.

I think that some importance must be given to the fact that Narayan was considerably the younger man He was only 18 compared with Ramchandra who was 60: therefore when the evidence on the question who died first is so evenly balanced I think we are entitled to say that the probabilities are in favour of the younger man surviving the elder.

That is also a desirable conclusion to arrive at as otherwise the property would go away from the family. Our finding that Narayan died last is sufficient to dispose of the case.

But an interesting question was raised whether if Ramchandra died last, the adoption of the 3rd defendant by Lakshmi could defeat the rights of the plaintiff. In *Ramkrishna Ramchandra* v. *Shamrao Yeshwant* (1) it was decided that where a Hindu dies leaving a widow and a son and that son himself dies leaving a natural born or adopted son or leaving no sons but his own widow to continue the line by means

(1) (1902) 26 Bom. 526 = 4 Bom. L. R. 315.

of adoption, the power of the former widow is extinguished and can never afterwards be revived. That decision was approved by the Privy Council in *Sri Madana Mohapa* v. *Sri Purushothama* (2).

Then in *Dutto Govind* v. *Pandurang Vinayak* (3) it was held that a Hindu widow, who succeeds to an estate not her husband's but as a *gotraja sapinda* of the last male holder under the rule established by *Lulloobhoy* v. *Cassibai* (4) and in consequence of the absence of nearer heirs, cannot make a valid adoption.

That decision would be binding upon us unless it has been reversed. But that decision was based on the decision in *Ramakrishna Ramachandra* v. *Shamrao Yeshwant* (1) which as I have already stated, has since been approved by the Privy Council.

The appellants, however, relied on the case of *Yadao* v. *Namdeo* (5). There was a joint Hindu family consisting of Pundlik, his cousin, Namdeo and the two sons of Namdeo. On Pundlik's death his senior widow, Champabai acting under the authority of her husband adopted Pandurang, one of Namdeo's sons. Pandurang died in childhood unmarried, but it was held that at the time of his adoption there was a separation between Pandurang on the one hand, and Namdeo and his remaining son on the other. On his death therefore his estate vested in Champabai who then adopted the plaintiff. Namdeo disputed the capacity of Champabai to adopt but it was held that, as her husband had not forbidden her to adopt if the boy named was not available or died, she had the power to adopt the plaintiff. The head-note to the case says.

"In the Maratha country of Bombay Presidency and in Gujarat a Hindu widow whose husband has not expressly forbidden her to adopt a son to him, has power to do so without the consent of her husband's kinsmen, whether or not her husband's estate is vested in her and whether he died joint or separate in family."

The Bombay Full Bench decisions in *Ramjee* v. *Ghamau* (6) and *Dinkar Sitaram* v. *Ginesh Shivram* (7) were disapproved. In those cases the widow of a deceased co-parcener who had not the family estate vested in her and whose husband was not separated at the time of his death sought to adopt without the authority of her husband and without the consent of the surviving co-parceners. The case of an adoption by a widow who has succeeded to the estate of her son and she can only do so if he was separated from the family, —would appear to be different. By such an adoption the widow does not bring a new member into the family, she merely endangers the expectations of the reversioners.

Their Lordships, however, appear to have considered the question of the validity of an adoption by a Hindu widow made as a religious duty to her husband apart from the question whether the adopted son would acquire thereby any rights to property, so that in the event of a case coming before this Court in which surviving co-parceners dispute the adoption by the widow of a deceased co-parcener, the question at issue will probably be whether the adopted son acquired, by virtue of his adoption, any rights in the joint family property and not whether the adoption was valid.

In *Mallappa* v. *Hanmappa* (8) the facts were very similar to the facts in *Yadao* v. *Namdeo* (5) except that

(2) A.I.R. 1918 P.C. 74=41 Mad. 855 =45 I.A. 156=20 Bom. L.R. 1041 =35 M. L. J. 138=5 P. L. W. 179=8 L. W. 167=16 A. L. J. 725=(1918) M. W. N. 621=24 M L. T. 231=28 C. L. J. 403=23 C. W. N. 177 (P. C.)

(3) (1908) 32 Bom. 499=10 Bom. L. R. 692.

(4) (1880) 5 Bom. 110=7 I. A 212= 7 C L. R. 445=4 Sar. 164 (P. C.)

(5) A. I. R. 1922 P. C. 216=49 Cal. 1=48 I. A. 513=20 A. L. J. 481= 42 M. L. J. 219=15 M. L. W. 595=26 C. W. N. 392=30 M. L. T. 53=24 Bom. L. R. 609 (P. C.)

(6) (1882) 6 Bom. 418 (F. B.)

(7) (1882) 6 Bom. 505 (F. B.)

(8) (1920) 44 Bom. 297=55 I. C. 814 =22 Bom. L. R, 203.

the deceased son was the natural son of the husband and not an adopted son. It was decided that the rights of the widow to adopt did not definitely come to an end, because a natural son was born so that if that natural son died without leaving a son or a widow and the mother succeeded as his heiress, her rights to adopt to her husband which had been in suspense, revived

Then in *Dattatraya Bhimrao* v. *Gangabai Ganeshbhat* (9) my brother Shah expressed the opinion that the principle underlying the rulings in *Ramkrishna Ramchandra* v. *Shamrao Yeshwant* (1) and *Datto Govind* v. *Pandurang Vinayak* (3) was not in any way affected by the observation in *Yadao* v. *Namdeo* (5).

It cannot be said, therefore, that the decision of this Court that a widow of a *gotraja sapinda* cannot adopt *so as to defeat the rights of the reversioners* has in any way been shaken by the decision in *Yadao* v. *Namdeo* (5).

If, therefore, Bhagirathi, though she took a life estate as a widow of a *gotraja sapinda*, had no power to adopt so as to defeat the rights of the reversioners, it equally follows that Lakshmi, who in the life time of Bhagirathi had only a right of maintenance, had no power to adopt so as to exclude the reversioners. The question whether those widows could have adopted so as to secure religious benefit to their husbands is an entirely different question from the one whether by such adoption they could defeat rights of inheritance.

We think, therefore, that the appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

Appeal allowed.

(9) A I R. 1922 Bom. 321 = 46 Bom. 541 = 24 Bom. L. R. 69.

A.I.R. 1922 Bombay 350.

MACLEOD, C. J. AND COYAJEE, J.

Talukhdari Settlement Officer—Plaintiff. Appellant

v.

Akuji Abhram and others—Defendants-Respondents.

F. A. No. 188 of 1920 decided on 20th February 1922 from the decision of D. J., Broach in Suit No. 3 of 1917.

(a) *Civil P. C. O. 1, R. 3—Redemption suit—Transferee, from mortgage claiming under Art. 134, Limitation Act—Can be impleaded as party*

The mortgage defendants (1 to 7) of certain talukdari lands mortgaged some of the mortgaged properties to defendants (8 to 10) who in a suit by plff. mortgagor against defts. (1 to 7) took objection to their being joined as defendants, on the ground that as the defendants 1 to 7 represented that they were owners of the lands they were mortgaging, they (defendants 8 to 10) were entitled to rely on that representation for the purpose of Art. 134 Limitation Act.

Held; There is no reason why the plaintiff mortgagor should not join defendants 8 to 10 in a suit against defendants 1 to 7. As he was endeavouring to get possession of all the suit properties and the only result of the defendants 8 to 10 establishing their claim under article 134 would be that the plaintiff in order to get possession of the lands mortgaged to them, would have to pay the amount due on the mortgages executed by defendants 1 to 7, there is no reason why all those questions should not have been decided in one suit.

[P. 351, C. 1.]

(b) *Gujrat Talukdars Act, S. 29 B—Notice of claim is necessary before claim can be considered.*

Although the plaintiff mortgagor who is desirous to redeem, has knowledge of the original mortgage deed, those who are desirous of claiming under that deed are bound to give notice in writing of their claim after the notification under section 29 B was issued. Otherwise their claims could not be considered. 19 Bom. L. R. 855; 34 Bom. 142 Foll.

[P. 351, C. 2, P. 352, C 1.]

G. N. Thakor—for Appellant.

N. K. Mehta Dhirajlal Thakor and *R. J. Thakor*—for Respondents.

Judgment :—The suit was filed by the plaintiff as Talukdari Settlement Officer and Manager of the estate of Naharsapgji Mehramansingji, the Thakorsaheb of Dehevan, to get possession of certain survey numbers alleged to belong to the Talukdari Estate. The suit property had been mortgaged in 1859 by the then Talukdar to the predecessors-in-title of defendants 1 to 7.

It seems that they partitioned amongst themselves the suit property, and dealt with the suit property as if they were owners, executing various mortgage deeds between 1895 and 1906 which resulted in 16 acres and 24½ gunthas becoming mortgaged to defendants 8,9 and 10, while 1 acre and 12½ gunthas of the suit property remaining in possession of the 2nd defendant. The Judge found that defendants 8 to 10 had been in possession for more than 12 years after the

lands had been mortgaged to them, although there seems to be an error with regard to the mortgage of 1906 which was less than 12 years before suit.

As the defendants 1 to 7, mortgagees of the Talukdars, represented that they were owners, defendants 8 to 10 were entitled to rely upon that representation for the purposes of Article 134 of the 2nd Schedule to the Limitation Act. The rights of defendants 8 to 10 to whom defendants 1 to 7 executed mortgages would be established after 12 years as against the Talukdar, and if he wished to redeem and recover possession of the properties, he would have to pay defendants 8 to 10 the amount due on the mortgages with regard to which they had been in possession for more than 12 years. The Judge found that the plaintiff's claim to get possession from defendants 8 to 10 was bad for misjoinder of causes of action, and dismissed the suit with regard to those defendants. The only result of that would be that the plaintiff will have to file another suit against those defendants to recover possession.

But in our opinion the Judge's decision was wrong. There is no reason why the plaintiffs mortgagors should not join defendants 8 to 10 in a suit against defendants 1 to 7. As he was endeavouring to get possession of all the suit properties, and the only result of the defendants 8 to 10 establishing their claim under Article 134, would be that the plaintiff in order to get possession of the lands mortgaged to them, would have to pay the amount due on the mortgages executed by defendants 1 to 7, there is no reason why all those questions should not have been decided in one suit.

Then the Judge has allowed the plaintiff to redeem the plaint lands remaining in possession of defendant 2 on payment of Rs. 95 within six months.

The plaintiff appeals against that part of the decree on the ground that he issued notice under Section 29 B of the Gujarat Talukdars' Act, and no answer to the notice was received within six months allowed by that section. The Judge says "In so far as defendants 1 to 7 are concerned it is clear that during the life-time of the father of the plaintiff the estate was in the hands of the Talukdari Settlement Officer. He had sent for the original mortgage deed and taken a copy of the deed. He became aware of the claim. It was not necessary for defendants 1 to 7 to have put in a claim again. Considering these circumstances I am of opinion that the section is not applicable to the facts of the present case."

That decision disregards the decision of this Court in *Shankerbhai* v. *Raisingji* (1) in which the plaintiff resisted the right of the Talukdari Settlement Officer to serve him with a notice under Section 202 and 79A of the Land Revenue Code on the ground that he was a mortgagee, and had represented to the Talukdari Settlement Officer that he was a mortgagee before Section 29B had been added to Bombay Act VI of 1898 but the Court held that the representation by the plaintiff that he was a mortgagee was not a notice complying with the provisions of Section 29B, which was not in existence at that time, and that as he had not answered to the notice issued under Section 29B of the latet date, his claim could not be considered.

We may also refer to *Purshottam* v. *Rajbai* (2) where it was decided that although a decree had been passed against a Talukdar, which was being executed before Section 29B was enacted, still notice of the claim was necessary after the notification under Section 29B had been issued; and the only question was whether the two written applications for the execution of the decree made after the notification were sufficient notices in writing of the plaintiff's claim. It must be inferred from that judgment that notices were required after the notification in spite of the fact that a decree passed against the Talukdar was being executed.

Therefore it would appear that although the plaintiff had knowledge of the original mortgage deed of 1859, those who were desirous of claiming under that deed were bound to give notice in writing of their claim after

(1) (1917) 19 Bom. L. R. 855=42 I. C. 908.

(2) (1909) 34 Bom. 142=4 I. C. 839=11 Bom. L. R. 1358.

the notification under Section 29 B was issued.

With regard to defendant No. 2, no such notice was given by him, and therefore, the plaintiff was entitled to possession of that part of the suit property which is in his possession without payment.

With regard to that portion of the suit property which is in possession of defendants 8 to 10, it has been argued that they had no knowledge that the property was Talukdari property, and that, therefore, they could not have been expected to give notice of their claim when their notification was issued under section 29 B. But section 29B (2) especially provides for such a case "where the managing officer is satisfied that any claimant was unable to comply with the notice published under sub-section (1), he may allow his claim to be submitted at any time after the date of the expiry of the period fixed therein; but any such claim shall, notwithstanding any law, contract, decree, or award to the contrary, cease to carry interest from the date of the expiry of such period until submission", and even if the managing officer is not satisfied that the claimant was unable to comply with the notice, and decides that his claim has been duly discharged, it would be still open for him to claim in a suit to ask for a decision of the Court that he was unable to comply with the notice and if the Court is satisfied that the claimant had sufficient reason for not being aware that the property, against which he had a claim, was Talukdari property, then we have no doubt that the Court would allow the claim. But in this case defendants 8 to 10 were served with notice so far back as 1912. They were bound then to give notice of their claim against the property to the plaintiff, and to ask him to give a decision under section 29 B (2).

It is far too late now to ask this Court in appeal to hold that they were unable to comply with the notice published under sub section (1) in 1905.

The result must be that the appeal succeeds, and that the plaintiff is entitled to recover the suit property from the defendants in possession with costs throughout.

Appeal allowed.

A. I. R. 1922 Bombay 352

MACLEOD, C. J. AND SHAH, J.

Bai Dhondubai and another — Appellants

v.

Laxman T. Javadekar and another— Respondents.

F. A. No. 99 of 1919 decided on 12th April 1922 from the decision of 1st Class Sub. J. of Ahmedabad in C. S. No. 552 of 1915.

(a) *Deed—Construction*

The language of one instrument does not afford much assistance in the construction of another. 36 Cal. 1003 (P. C.)

(b) *Hindu Law—Will—Donee named as adoptee-Gift is to donee as a* persona designata *and not conditional on adoption being valid.*

Where there is absolutely nothing in the Will to show that the fact of the adoption of the plaintiff was the motive or reason for the gift in the absence of anything of the kind, interpreting the language of the gift in its ordinary meaning, the Court must treat it as a gift to donee as a *persona designata* and hold the gift as valid.

The distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances. 11 Cal. 463 (P. C) Foll. 31. All. 5 Ref.

Coyajee and *H. V. Divatia*—for Appellants.

Strangman, G. N. Thakore and *R. J. Thakore*—for Respondents.

Judgment :—This is an appeal from the decision of the First Class Subordinate Judge of Ahmedabad. The facts of the case are fully set out in the judgment. The only question that has been argued in this appeal is whether the plaintiff has proved his title to the suit house. The plaintiff claimed under the will of his brother Janardan, who died on the 6th January 1913. Janardan had been adopted in 1912 by his mother's father Vishnupant. In October 1901 Vishnupant made a will and under that will he gave a life interest in the suit house to his wife Rakamabai and the remainder over to his adopted son Janardan.

Vishnupant died in 1901 and in 1908 certain disputes that had arisen between Janardan and Rakamabai were settled by the execution of a deed of release and agreement, whereby Janardan's interest in the suit

house after the death of Rakamabai was recognised.

The only question, therefore, is whether the gift of the suit house by the will of Vishnupant was a valid gift ; and that depends on the question whether the testator merely described Janardan as his adopted son or intended that the validity of the gift should be conditional on the validity of the adoption. As was pointed out in *Abhiram Goswami* v. *Shyama Charan Nandi* (1) the language of one instrument does not afford much assistance in the construction of another : and the case of *Fanindra Deb Raikat* v. *Rajeswar Dass* (2) which is relied upon by the appellants cannot afford any assistance to the Court in construing the present will, as the words in the Angikarpatra in that case were entirely different. If we were to consider the facts in other cases, the document in *Lalta Prasad* v. *Salig Ram* (3) was almost in the exact terms of the present will. The testator in that case gave all his property to his wife for her life and then declared that after her death Lalta Prasad his adopted son, should be owner of the property. The learned Judges said :

There is absolutely nothing in the will to show that the fact of the adoption of the plaintiff was the motive or reason for the gift, and, in the absence of anything of the kind, it appears to us that, interpreting the language of the gift in its ordinary meaning, we must treat it as a gift to Lalta Prasad as a *persona designata*, and that therefore the gift is valid".

As was stated in *Fanindra Deb Raikat* v. *Rajeswar Dass* (2) "the distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances". It seems to us that the Court should not strain to adopt a construction, which would defeat the intention of the testator, unless it was absolutely certain from the words of the will that the testator intended to make the gift to Janardan conditional on the adoption being valid.

There is no indication that Vishnupont had any such intention. We can only presume that he had adopted his daughter's son out of motives of affection and for perpetuating his name without considering too deeply the rules of Hindu Law which invalidated such an adoption. No doubt, he hoped his family would recognise the adoption and not dispute it. But having made the adoption so far back as 1892, when he came to make his will it is clear that he wanted to make this gift to Janardan, and he merely described him as adopted son in the ordinary course without intending that the gift should be conditional on the adoption of Janardan being valid according to the rules of Hindu Law. He also in the will directed that Janardan should take one-third share in the Inam property.

We are not concerned with that gift but it may be pointed out that the words of that gift were somewhat different and would tend more to the construction which the appellants wish the Court to put upon the words of the gift of the house. If that difference of language has any value, it is more against the appellants, for it shows that whatever the intention of the testator might have been with regard to the share in the Inam property, at any rate with regard to the house he intended to give it to Janardan, whatever disputes might arise in the future with regard to his adoption. It is not necessary, therefore, to say anything with regard to the effect of the compromise or arrangement which was arrived at in 1908.

For his own safety Mr. Coyajee asks us to express the opinion that the 8th issue in the suit, whether the Defendants 2 to 4's plea as to the invalidity of Janardan's adoption is barred by limitation has not been considered, and we do so.

The appeal will be dismissed with costs, i.e, with costs as against respondent No. 1 ; the other respondents to bear their own costs.

Appeal dismissed.

(1) (1908) 36 Cal. 1003=36 I.A. 148 =10 C.L J. 284=6 A.L.J. 857=11 Bom. L.R. 1234=19 M.LJ. 530=14 C.W.N. 1 =4 I.C. 449 (P.C)

(2) 11 Cal. 463=12 I.A. 72=4 Sar. 610 (P.C.)

(3) (1909) 31 All. 5=(1908) A.W.N. 251=1 I.C. 555=5 A.L.J. 626.

A. I. R. 1922 Bombay 354.

MACLEOD, C. J. AND COYAJEE, J.

Gangaram B. Mahadik and another—Appellants

v.

Bapusaheb alias *Krishnarao D. Mahadik and another*—Respondents.

F. A. No. 95 of 1921 decided on 6th March 1922 from Sub-J. of Satara in C. S. No. 769 of 1919.

(a) *Hindu Law—Succession*—Dasiputra-*must be the issue of a permanent mistress.*

Where the defendants alleged that they were the descendants of one D who was the *Dasiputra* of one J, and the evidence showed that they had used the same family surname as J, had been living in the same family *wada* and had paid assessment direct to Government and that in a letter written by the father of the plaintiffs, to defendant, such terms were used as would ordinarily be used to a relation and not to a stranger.

Held: that as assuming D was the illegitimate son of J, it does not follow that D was the issue of a permanent mistress.

[P. 354, C. 2.]

(b) *Civil Procedure Code, O. 1, Rr. 1, 9—Joint family—Rent Note to jagirdar—Junior members of family need not be made parties.*

Where defendants had passed a rent note to the Jagirdar-plaintiff and in a suit on the rent deed defendants contended that M & K, two other junior members of the plaintiff's family ought to have been made parties.

Held, that they were not necessary parties. The signing of the rent note by defendants in favour of plaintiff would entitle plaintiff alone to sue without making any other persons parties. [P. 355, C. 1,]

G. S. Rao—for Appellants.

K. N. Koyaji—for Respondents No. 1.

Judgment:—The plaintiff in this suit is a Sardar and Jahagirdar in the Gwalior State. His estate is in the management of the Court of Wards, and he has filed this suit through the Court of Wards against the defendants to recover possession of certain property in the Satara District alleged to belong to the plaintiff. It is admitted that the suit property belongs to the plaintiff's family. But the defendants claimed that they have been in possession of the suit property as the descendants of one Dhondi, who, it is asserted, was the *dasiputra* of Janrao. It is admitted that there is no decisive evidence in favour of that assertion; and no doubt there would be very great difficulty in proving the connection between Dhondi's mother and Janrao, considering the time that has elapsed.

But it has been urged upon us that there are surrounding circumstances from which we must necessarily infer that Dhondi was a *dasiputra*. The descendants of Dhondi have used the same family surname as the plaintiff. They have been living in the family *wada* in the village of Ninam since the time of their ancestors. They have not paid any rent. They have paid assessment direct to Government, and reliance was placed on a letter written by Daulat Rao, the father of the plaintiff, to Laxman, defendant 3, using such terms which would ordinarily be used to a relation, and not a stranger.

Now it may be even assumed that Dhondi was the illegitimate son of Janrao, and that the possession of his descendants of this property in the Satara District was the natural consequence of that connection, but it does not follow that Dhondi was the issue of a permanent mistress; and we agree with the very careful analysis, of all the circumstances urged by the appellants, of the learned Judge in the Court below, that they are not sufficient to enable the Court to conclude that Dhondi was a *dasiputra*.

Against the circumstances which are relied upon as leading to an infer-

ence that Dhondi was a *dasiputra*, there are these facts that the 3rd defendant in 1910 executed a rent note at Gwalior in favour of the plaintiff's father, and that in 1915 defendants 1 and 2 executed at Satara a rent note in favour of the present plaintiff.

It was suggested that these rent notes were obtained by improper means, but there is no evidence to warrant a finding to that effect. It is not suggested that the defendants have ever dealt with the property as their own, and as the Judge remarks, when the Record-of-Rights was prepared, they put forward no proprietary rights of their own, and that fact must go very much against them.

Then it was urged that the suit must fail for non-joinder of proper plaintiffs. Undoubtedly in the pedigree Madhavrao and Keshavrao are members of Janrao's family, the junior branch, being first cousins of the plaintiff. From the evidence of the plaintiff's Mukhtyar it seems that Madhavrao and Keshavrao were drawing an allowance of Rs. 300 a month, each from the estates composing the Jahagir.

The Jahagir, we have been told, is very valuable, the income being estimated at Rs. 75,000 a year, and the fact that these two members of the junior branch are only drawing Rs. 300 a month each seems to show that it is recognised in Gwalior that the elder branch of the Jahagirdar's family has permanent rights to the revenues of the Jahagir. However that may be, the fact remains that the rent notes were signed by the defendants in favour of the plaintiff, and that by itself would entitle the plaintiff to sue for possession if the defendants refuse to comply with the terms of the rent notes. Not only that, but they have set up their own title against the title of the plaintiff.

We do not think in these circumstances the suit is bad because the plaintiff has sued alone without joining Madhavrao and Keshavrao. Such a non-joinder cannot in any way prejudice the defendants as they would not be liable to have any demand made upon them for rent by Madhavrao and Keshavrao, and they would not be concerned with any question which might arise between the plaintiff and his cousins with regard to the income of the property.

In *Bando* v. *Jambu* (1) the plaintiff sued to recover on a promissory note, but Mr. Justice Chandavarkar at p. 809 dealt generally with the rights of one member of a Hindu family to sue on a contract made with an outsider when the contract was made to that member alone. The learned Judge says,

"The law is that where credit is given to an individual member in a Hindu family by an outsider, in respect of a contract whether it be of money lending, or of letting, the contract is one on which that member alone is entitled to sue. The principle of the decision in *Gurushantappa* v. *Chanmallappa* (2) has been followed as regards leases executed in favour of a single coparcener in a joint Hindu family. There is a ruling to that effect in *Sayad Fatulla Valad Sayad Kamlodin* v. *Bola Bin Shivaya Gavda* (3) where it was said "He who passes a Kabuliyat to one of two or more who have a common interest cannot free himself from his liability by payment to another unless that other is the agent of the one with whom he has contracted. The defendant having attorned to the nephew exclusively and having had enjoyment undisturbed by the nephew in consequence, must pay him. That principle has been followed in a series of cases, which will be found in our Printed Judgments and also in the Law Reports."

Reliance is placed by the appellants on *Balakrishna* v. *Moro* (4). But that case is only an authority for this proposition that where a co-sharer is a manager of the family property and has issued a notice on a tenant calling upon him to pay enhanced rent, he cannot maintain a suit by himself and in his own name, to eject a tenant who has failed to comply with the notice.

It is clear that when the question of demanding enhanced rent arises, it would be to the prejudice of the tenant if one member of the joint

(1) (1910) 12 Bom. L.R. 801 = 7 I.C. 986.
(2) (1900) 24 Bom. 123 = 1 Bom. L.R. 556.
(3) (1884) P.J. 33.
(4) (1897) 21 Bom. 154.

family could issue a notice to enhance, and if that was not obeyed, sue in ejectment by himself. If that were allowed the tenant might be open to a succession of suits by various members of the family of a similar kind. No question of the sort arises in this case since, as we have pointed out, the defendants are in no way prejudiced by the plaintiff suing alone, and in no case could there be any chance of their being troubled by another suit filed by the other members of the family.

We think, therefore, that the judgment of the Court below was right and the appeal must be dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Bombay 356

MACLEOD, C.J. AND COYAJEE, J.

Bhagwan Ganpat—Plaintiff-Appellant.

v.

Madhav Shankar and others.—Defendants-Respondents.

S. A. No. 371 of 1921, decided on 21st February 1922 from the decision of Asst. J., Sholapur in A. S. No. 140 of 1920.

(a) Limitation Act, S. 19 and Art. 148—Acknowledgment—Must point with certainty the disputed liability.

Wherein a rent note of 1878 given by the sub-mortgagee to the mortgagee the property was described as "the property mortgaged to you." *Held* that the sub-mortgagee's signature on the rent note cannot mean an acknowledgment of liability to be redeemed by the original mortgagor.

If a suit against original mortgagee were barred, it is difficult to see how it would not also be barred against sub-mortgagee, unless he had directly admitted his liability to be redeemed by the mortgagor, and the signature on the rent note did not point with reasonable certainty to that liability. [P 357, C. 1.]

(b) Limitation Act, S. 20 (2)—Period is not extended in favour of mortgagor.

Held that S. 20, Sub-section 2 extends the period of limitation in favour of mortgagee but not in favour of mortgagor.

[P. 357, C. 1, 2, P. 358, C. 1, 2.]

G. S. Rao—for Appellant.

P. B. Shingne.—for Respondent.

Macleod, C. J.—The plaintiff sued to redeem and recover possession of the suit property after accounts had been taken under the Deccan Agriculturists' Relief Act.

The property was originally mortgaged in 1836 by Shankar Janardan Joshi for Rs. 100 repayable in 10 years to Ramchandra Motiram. Ramchandra sub-mortgaged the property to Rajaram Renukadas in 1841. Defendants 1 and 2 were in possession as his heirs. Ramchandra died without leaving heirs. The plaintiff, defendant 3 and one Vishwanath were the heirs of Shankar Janardhan, but Vishwanath renounced his rights in favour of plaintiff's father.

Prima facie a suit for redemption became time-barred in 1906 but the plaintiff relied upon a rent-note dated the 11th February of 1878 taken by Shankar Narhar the father of defendant No. 1 in which the property was described as 'the property mortgaged to you' Shankar Narhar presented the document for registration, and signed it. Shankar Narhar thereby acknowledged his liability as a mortgagee to be redeemed by his mortgagor Ramchandra Motiram or his successors. The learned trial Judge appears to have come to the conclusion that Shankar also by the same signature acknowledged his liability to be redeemed by the original mortgagor and decreed the plaintiff's claim. The learned Assistant Judge was of opinion that as the acknowledgment was made by the sub-mortgagee, it was not intended to acknowledge the original mortgage also. Admitting that Shankar knew that Ramchandra Motiram was himself only a mortgagee of the property he was not concerned with the question whether time was running in favour of Ramchandra against his mortgagor and I am not prepared to give an extended meaning to Shankar's signature on the rent-note so as to make it an acknowledgment under Section 19 of the Limitation Act, XV of 1877 of a liability to be redeemed by the original mortgagor with whom he had no privity.

As pointed out in *Hiralal Iohhalal* v. *Narsilal Chaturbhuj* (1) an acknowledgment to whomsoever made is a valid acknowledgment only if it points with reasonable certainty to the liability under dispute. It was argued that when a mortgagor

(1) (1913) 37 Bom. 326 = 40 I. A. 8 = 15 Bom. L. R. 483 = 17 C. W. N. 573 = 13 M. L. T. 415 = (1913) M. W. N. 428 = 11 A. L. J. 432 = 17 C. L. J. 474 (P. C.)

brings a redemption suit against his mortgagee who has sub-mortgaged, the sub-mortgagee is a necessary party under Order 34, rule 1, and that consequently if he admits his own mortgage he admits the mortgage to his mortgagor. But I agree with the learned Assistant Judge that this inference in the absence of direct authority in its favour is too far-fetched. Taken at its highest Shanker's signature on the rent-note cannot mean more than this.

"I admit Ramchandra and his heirs can redeem me and as Ramchandra is a mortgagee he is liable to be redeemed himself. If his mortgagor sued for redemption I know I can claim to be made a party to that suit so that my mortgage rights against Ramchandra can be considered when his claim against his mortgagor is adjusted".

But if a suit against Ramchandra were barred it is difficult to see how it would not also be barred against Shankar unless he had directly admitted his liability to be redeemed by the mortgagor, and the signature on the rent-note does not point with reasonable certainty to that liability.

Then it was argued that as the mortgagee was in possession of the mortgaged property and receiving the rents and profits the right to redeem was preserved by Section 20, Sub-Section (2) of the Limitation Act.

In *Ganu* v. *Krishnaji* (2) it was held that the receipt of produce of the mortgaged property by a mortgagee could be deemed to be a payment for keeping alive the period of limitation for a suit to recover the mortgage debt, but only an acknowledgment of the right to redeem under Section 19 could keep the right to redeem alive.

It may be said that the question was not directly in point in that suit but in *Chinto* v. *Balkrishna* (3) it was held that in a redemption suit by plaintiff the application of Section 20 of the Limitation Act did not keep alive the right to redeem. These decisions were followed in *Anwar Husain* v. *Lalmir Khan* (4). Blair, J. said 'It appears to me on further consideration that the scope of Section 20 is limited by the opening words of that section and extends only to the remedies of persons entitled to a debt or legacy.' And Banerji, J. said "The effect of any other view of Section 20 would be practically to exclude suits for redemption of usufructuary mortgages from the operation of the Limitation Act."

I think therefore the decision of the lower appellate Court was right and the appeal must be dismissed with costs.

Coyajee, J.—The property in dispute in this case belonged to Shankar Janardhan who mortgaged it with possession to Ramachandra Motiram in the year 1836. In 1841 Ramchandra sub-mortgaged it to Rajaram Renukadas. Shankar, the mortgagor, Ramchandra the mortgagee and Rajaram the sub-mortgagee all died long before the commencement of the present litigation. The plaintiff (now Appellant) claiming to be an heir of Shankar Janardhan institutes this suit to redeem the mortgage effected by the latter in the year 1836. The mortgagee Ramchandra is said to have left no heirs. The 1st defendant who alone contests the plaintiff's claim is now in possession of the suit property, Rajaram's interest having descended to him by inheritance.

The plaint was filed on the 3rd of October 1919; the suit was therefore instituted after the expiry of the period prescribed by Article 148 of the Limitation Act, 1908. It was however alleged in the plaint that the claim was saved from the bar of limitation by certain recitals contained in a document, a copy of which is put in as Exhibit 23 in the case. It appears that the plaintiff's father Shankar Narhar being the heir of the sub-mortgagee Rajaram and being in possession of the suit property, let it to one Phandu on the 11th February 1878 for a period of five years. Phandu executed a rent-note—the original of Exhibit 23—in favour of Shankar Narhar, describing the property as "of your ownership by mortgage."

Shankar Narhar presented this document for registration; certain particulars were then endorsed thereon as required by the Registration Act; and Shankar Narhar signed such endorse-

(2) (1893) P. J. 318
(3) (1893) P. J. 346
(4) (1904) 26 All. 167=(1903) A. W. N. 223.

ment. It was claimed for the plaintiff in the trial Court that this signature amounted to an admission by Shankar Narhar of the contents of the rent-note, that the description of the property as "of your ownership by mortgage" was an acknowledgment of liability in respect of the plaintiff's right to redeem the original mortgage of 1836; and that therefore, under the provisions of Section 19 of the Limitation Act, a fresh period of limitation should be computed from the date of the rent-note. This contention was accepted by the trial Judge who gave a decree for redemption as prayed.

Against this decree the 1st defendant appealed to the Court of the Assistant Judge at Sholapur. The plaintiff, in support of the decree, relied on the provisions of Section 19 as also on those contained in Section 20 (2) of the Limitation Act. The Assistant Judge held that the plaintiff was not entitled to claim exemption from the law of limitation under either of those provisions; he therefore dismissed the plaintiff's suit. In my opinion the decision of the learned Assistant Judge is right.

Dealing first with Section 19, it may be conceded that for the purpose of excluding the law of limitation "any expression referring to the estate as mortgaged will be a sufficient acknowledgment. No particular form is necessary, the acknowledgment may be made as well by affidavit in a suit, or in a schedule to a deed, or by an answer to interrogatories, as by a letter or other writing" (Fisher's Law of Mortgage, Section 1408). Here it is urged that the acknowledgment took the form of a description; that Shankar Narhar allowed himself to be described as mortgagee of the property in question; and that his acceptance of that position amounted to an acknowledgment of his liability to be redeemed by the mortgagor.

This proposition would be clearly unassailable if Ramchandra's heirs had been suing Shankar Narhar or his successors in-interest to redeem the sub-mortgage of 1841 (*Pranjiwandas Parshottamdas* v. *Bai Mani* (5)). But in my opinion the said admission cannot avail the plaintiff; for he is seeking to redeem the mortgage effected by Shankar Janardhan in favour of Ramchandra. There is nothing in the document Exhibit 23 which could be held to amount to an acknowledgment of the particular liability now in dispute, namely, the liability in respect of the plaintiff's right to redeem the mortgage effected by Shankar Janardhan in the year 1836. *Gopalrao* v. *Harilal* (6). The effect of the rent-note is correctly described by the Assistant Judge thus:

"At the most, he (Shankar Narhar) admitted that the origin of his possession was a mortgage, and obviously he meant the mortgage to him, or rather to his ancestor Rajaram by Ramchandra Motiram, but he made no admission in the acknowledgment that the said Ramchandra himself was a mortgagee".

Moreover, it is not shown that Shankar Narhar signed the acknowledgment as Ramchandra's agent "duly authorized" in that behalf (Explanation II, Section 19). The result is that the plaintiff is not entitled to claim the benefit of an extended period under the provisions of Section 19.

The argument based on sub-section (2) of Section 20 is, in my opinion, equally untenable. Even assuming that the 1st defendant is "the mortgagee" contemplated in that Section, still the provisions contained therein do not operate to extend the period prescribed by Article 148 of the Act for the redemption of a mortgage; they are clearly intended for the benefit of a mortgagee suing on the mortgage-debt. For, by Section 20 (2) it is enacted that the receipt of the rent or produce of mortgaged property by the mortgagee in possession "shall be deemed to be a payment for the purpose of subsection (1)".

The purpose of sub-section (1) is clear, where interest on a debt or legacy is paid by the person liable to pay the debt or legacy, or where part of the principal of a debt is paid by the debtor, *the person entitled to the debt* or legacy acquires the benefit of a fresh period of limitation. The scope of sub-section (2), then is limited; it extends the period of limitation allowed to a mortgagee for suing on the mortgage-

(5) A. I. R. 1921 Bom. 291=45 Bom. 934.

(6) (1907) 9 Bom. L. R. 715.

debt; it does not confer a like indulgence on a mortgagor suing to redeem the mortgage. This was the interpretation put upon the clause by Sargent, C. J and Telang, J in *Ganu* v. *Krishnaji* (2) and again in *Chinto* v. *Balkrishna* (3). A similar view was taken by the High Court at Allahabad in *Anwar Husain* v. *Lalmir Khan* (4). It was however urged in this second appeal that the rights of the mortgagor and the mortgagee being co-extensive and reciprocal, there is no reason to suppose that the Legislature extended the indulgence to the mortgagee alone but declined it to the mortgagor The answer to this argument may best be given in the words of Rattigan, J. in *Khilanna Ram* v. *Jinda* (7).

No doubt by the general law the right to redeem and the right to foreclose are co-extensive rights. In the present case we have to apply the provisions of the law of limitation, which is a special law, and we cannot enlarge exceptions of time allowed by that law beyond their legitimate limits.

I therefore agree that the decree of the lower Appellate Court should be affirmed and this appeal dismissed with costs.

Appeal dismissed.

(7) (1883) 37 P. R. 1883.

A. I. R. 1922 Bombay 359.

MACLEOD, C. J AND SHAH, J.

Ranga Swami Shetti—Decree-Holder—Appellant

v.

Sheshappa Manjappa Shimpi—Judgment-debtor-Respondent.

S. A. No. 429 of 1921, decided on 13th April, 1922, from the decision of D. J. Kanara in Appeal No. 17 of 1920.

(a) *Limitation Act, Art. 182 (5)—Transfer of decree—First Court ceases thereafter to be the proper Court.*

When a Court which has passed a decree sends it for execution to another Court, then the first Court ceases to be the proper Court within the meaning of Schedule I, Article 182 (5) [P. 360, C. 1.]

(b) *Civil P. C., S. 42—Decree transferred to another Court—Application for transfer to third Court—Whether can be made to first Court is doubtful.*

Per Shah, J.—It is possible to read section 42 in a comprehensive manner and to hold on the words of that section that even an application for the transfer of the decree again to another Court must be made in the first instance to the Court to which the decree has already been transferred. I should have been glad to see my way, if possible, to hold that another application for a transfer to third Court might be made to the Court which had originally passed the decree. At any rate it may be said in favour of the view that there is no express provision prohibiting such a procedure. [P. 360, C. 2.]

P. B. Shingne—for Appellant.

G. P. Murdeshwar—for Respondent.

Macleod, C. J:—The plaintiffs obtained a decree in the Court of the Principal District Munsiff of Salem of the Madras Presidency in 1910. After ineffective attempts at execution the decree-holder applied that the decree should be transferred to the Court of the Subordinate Judge of Sirsi in the Bombay Presidency for execution. The decree was transferred in July 1914.

No steps were taken in the Sirsi Court to execute the decree and the Sirsi Court returned the decree unexecuted to the Salem Court in November 1918. In 1919 the Salem Court again transferred the decree to the Sirsi Court and the present darkasht was filed on 9th June 1919. The judgment-debtor opposed on the ground that execution was barred. The question was whether an application which had been made on the 4th August 1916 to the Salem Court praying that the decree might be sent to the District Munsif of Sagaram in the Mysore State for execution was a step-in-aid in execution made to the proper Court.

The District Judge following the decision in *Maharajah of Bobbili* v. *Narasarajupeda Srinhulu* (1) came to the conclusion that the Salem Court was not the proper court in which to apply to take a step-in-aid when the decree had been transferred to the Sirsi Court. Under Schedule I, Article 182 (5) of the Limitation Act the period of limitation applicable is 3 years from the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree, and the "proper Court" by Explanation II means the Court whose duty it is to execute the de-

(1) A. I. R. (1916) P. C. 16=39 Mad. 640=43 I. A. 238=18 Bom. L. R. 909=31 M. L. J. 300=14 A. L. J. 1129=20 M. L. T. 472=24 C. L. J. 478=4 L. W. 558=(1916) 1 M. W. N. 541=21 C. W. N. 162=1 P. L. W. 26 (P. C.)

cree or order. Under Order 21, rule 10 "where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer thereof.

In *Maharajah of Bobbili* v. *Narasarajupeda Srinhulu* (1) a decree was passed by the District Court and was sent to the Court of a Munsiff for execution, and it was held that when the decree of a District Court had been sent, under the Code of Civil Procedure, 1882, section 223, to the Court of a Munsiff for execution and had not been returned to the District Court, the "proper Court" within the meaning of the Limitation Act 1908, Schedule I, Article 182 (5), in which to apply "for execution, or to take some step-in-aid of execution" of the decree was the Court of the Munsiff, with the result that an application to the District Court would not prevent the time for enforcing the decree from running (under Article 182) from the date upon which it was made.

In that case the application to the District Judge was for execution of the decree by sale of immoveable properties whereas in this case there was an application to the Court of Salem for the transfer of the decree to another Court.

It seems to me to make little difference whether there is an application for execution or only an application to take a step-in-aid of execution. For it clearly seems to have been their Lordships' opinion that when the Court which has passed a decree sends it for execution to another Court, then the first Court ceases to be the proper Court within the meaning of Sch. II, Article 182 (5) of the Limitation Act.

Therefore the decision of the District Judge was right and the appeal must be dismissed with costs.

Shah, J:— I have felt some difficulty in this case. Though it is clear from the provisions of Section 42, that when the decree is once transferred to another Court, that Court has the same powers in executing such decree as if it had been passed by itself. I do not find any express provision in the Code as to what procedure a party is to adopt when he wants to get the decree transferred again to another Court.

There is no provision as to whether in such a case the application should be made by him in the first instance to the Court to which the decree has been transferred or to the Court which originally passed the decree, and which made the order transferring the decree for execution on the first occasion. The difficulty arises from the absence of any express provision in the Code on the point. It is possible however, to read Section 42 of the Code in a comprehensive manner, and to hold on the words of that section that even an application for the transfer of the decree again to another Court must be made in the first instance to the Court to which the decree has already been transferred; and the observation in *Maharajah of Bobbili* v. *Narasarajupeda Srinhulu*: (1) shows that all the applications after the decree is once transferred for execution to another Court in connection with its execution, must be made to that Court.

No doubt the application in that case was for the execution of the decree, and as it was made to that Court which had already transferred the decree, it was held that the application was not made to the proper Court. The application in the present case is not exactly of that kind, and I should have been glad to see my way if possible, to hold that another application for a transfer to a third Court might be made to the Court which had originally passed the decree At any rate it may be said in favour of that view that there is no express provision prohibiting such a procedure.

At the same time there is much to be said in favour of the view accepted by the lower appellate Court, and by my Lord the Chief Justice. On the whole I think, though not without hesitation, that

the application in this case to the Salem Court, which had already transferred the decree for execution to the Sirsi Court, for a transfer of the decree to another Court cannot be treated as having been made to the proper Court and therefore cannot be held to be a step-in-aid of execution.

Appeal dismissed.

A. I. R. 1922 Bombay 361.

SHAH, A.C.J. AND CRUMP, J.

The Government Pleader, High Court Bombay—Applicant

v.

Vinayak Balwant Chaukar and others—Opponents.

Civ. Application No. 187 of 1922, decided on 20th July 1922.

Bombay Pleaders Act (1920), S. 25—Criticism pending trial in public meeting is improper conduct—Disciplinary action—Letters Patent (Bombay) Cl. 10.

While certain persons were on their trial a resolution moved by the second and supported by the third opponent was passed under the presidentship of 1st opponent, a Dist. Pleader congratulating them upon their sacrifice.

Held: The opponents acted improperly in being parties to a resolution of this character. Anything done or said which may amount to criticism of any proceedings pending in a Court of Justice is calculated to hinder the even and impartial administration of justice. Pleaders have privileges, but they have responsibilities also, and a pleader who acts so as to hinder and embarrass the administration of justice is guilty of "improper conduct" within the meaning of those words as used in section 26, Bombay Pleaders Act and such conduct furnishes "reasonable cause" for the exercise of disciplinary jurisdiction under S. 25.

[P. 362, C. 2.

The Government Pleader—In person.

G. S. Rao for *D. C. Virkar* and *P. V. Kane*—for Opponents Nos. 2 and 3.

Shah, C. J:—This is an application by the Government Pleader under our disciplinary jurisdiction for action being taken against the three opponents. The three opponents are (1) Mr. Vinayak Balwant Chaukar, District Pleader, (2) Mr. Kundanmal Sobhachand Firodia, District Pleader, and (3) Mr. Chintaman Mohiniraj Saptarishi, High Court Vakil, all practising in the District of Ahmednagar.

The 1st opponent was enrolled in May 1883, and is an old pleader holding a Sanad of this Court. The other two opponents Nos. 2 and 3 received their Sanads in 1910 and 1911 respectively. The allegations against them which are set forth in the petition, and which are not disputed, are that on the 24th October 1921, while Gangadharrao Deshpande and the Ali brothers were on their trial at Dharwar and Karachi respectively, a meeting was held at Ahmednagar and was presided over by opponent No. 1 and a resolution congratulating the convicts in the Dharwar Sessions Case and Gangadharrao Deshpande and the Ali brothers was moved by opponent No. 2 and seconded by opponent No. 3. The resolution runs as follows:—

"This meeting congratulates Maulana Mahomedali and Shaukatali and other leaders who are on their trial at Karachi as well as the leaders and other persons convicted in Dharwar case and also Mr. Gangadharrao pleader of Belgaum, who is on his trial at Dharwar."

We do not know whether any speeches were made by the opponents 2 and 3 at the time, and if any were made, the reports of those speeches are not before us. The application is based upon the part taken by these opponents at this meeting. The resolution which I have above set forth was passed on that day.

The explanations which the opponents offered to the District Judge are in the paper-book. In response to the notice issued on the application of the Government Pleader, opponent No. 1 has not appeared before us and opponents 2 and 3 have put in their appearance, and their case has been presented to us by Diwan Bahadur Rao.

In support of the application it was urged that this resolution amounted to contempt of Court. In my opinion, however, it is not necessary to go into this question. That is a question which may raise some difficult points; for instance, we will have to consider whether such a resolution passed at Ahmednagar in respect of one proceeding pending at Dharwar and another

at Karachi would constitute contempt of this Court, because it is only the contempt of this Court as such that we would be concerned with.

In this respect it seems to me that, if it had been necessary to examine that question, we would have to examine it on the lines indicated in my judgment in *Emperor* v. *Balkrishna* (1):—' in each case it must be determined as a question of fact having regard to all the circumstances including the nature of the contempt, the nature of the proceedings with reference to which the contempt is committed, the relation of the Subordinate Court to the High Court with reference to those proceedings and its probable effect upon the due administration of justice".

This, however, is an application for such action as we may think proper to be taken under our disciplinary jurisdiction under section 25 of the Bombay Pleaders Act XVII of 1920, and clause 10 of the Amended Letters Patent. What we have to consider is whether any reasonable cause has been shown for taking action under our disciplinary jurisdiction.

On that point the observations in *In re Sashi Bhushan Sarbadhicary* (2) which have been referred to and relied upon by the learned Government Pleader are in point. The observations are at p. 45 "Their Lordships will not attempt to give a definition of 'reasonable cause', or to lay down any rule for the interpretation of the Letters Patent in this respect. Every case must depend on its own circumstances. It is obvious that the intention of the Crown was to give a wide discretion to the High Court in India in regard to the exercise of this disciplinary authority. The rules of the Court, to which reference has been made, indicate the precautions taken by the Court itself to secure that the powers shall not be used capriciously or oppressively, and there is no reason to apprehend that the just independence of the Bar runs any risk of being impaired by its exercise".

(1) A. I. R. 1922 Bom 52=46 Bom. 592=24 Bom. L. R. 16.

(2) (1907) 29 All. 95=34 I. A. 41=11 C. W. N 273=4 A L J. 54=9 Bom. L R. 9=5 C. L. J. 130=17 M. L. J. 74=6 M. L. T. 1 (P. C.)

What we have to decide is whether an active participation in the passing of a resolution of this character amounts to a reasonable cause within the meaning of clause 10 of the Amended Letters Patent, and section 25 of the Bombay Pleaders Act XVII of 1920. In determining that, I prefer to confine myself to the facts which are apparent on the resolution itself and which are not in dispute. The resolution in terms refers to certain persons on their trial at the time, and to other persons convicted in the Dharwar case. The reference is to a case which was then decided, or believed by those who took part in the resolution to have been finally decided.

The real complaint in respect of this resolution to my mind is based upon the fact that these felicitations were offered to persons who were to be put on their trial at a time when the proceedings were pending The question is not as to what reasons influenced any particular individual in endorsing this resolution; but the fact remains that it was a resolution passed in respect of persons concerned in pending proceedings.

It is a proposition which is not always fully realized, but which is none the less true, and ought to be obvious, that anything done or said which may amount to criticism of any proceedings pending in a Court of justice is calculated to hinder the even and impartial administration of justice

It is I think fair to say that officers of this Court who hold Sanads of this Court are expected to extend their co operation and assistance in the task of the administration of justice, and the least that could be expected of them is that by their act they will cause no hindrance to the even and impartial administration of justice.

The main ground, upon which it seems to me that the present opponents have transgressed the limits of proper conduct as pleaders appears to me to lie in the fact that they in a meeting assembled took part in the passing of a resolution which in its effect would amount to a criticism of the pending proceedings. I think, therefore, that the opponents acted improperly in being parties to a resolution of this character.

It has been urged on behalf of opponents 2 and 3 in the course of a clear and forcible argument by Diwan Bahadur Rao that the reasons which actuated his clients *i.e* opponents Nos. 2 and 3, are set forth in their explanations, and if those are the true reasons, they cannot be said to have transgressed the limits of proper conduct. I will take the explanation of opponent No. 2. In paragraphs 5 and 6 it is stated as follows:—

"No reflections of any kind against the Courts or their proceedings were ever desired or intended by the Opponent.

The resolution in question was intended to appreciate the sacrifice which the persons concerned were ready to make for their principles and honest convictions."

The opponent No. 3 also has made a similar statement. It is urged that if a pleader who honestly believing that a particular man on account of his character and the sacrifice which he was ready to make deserved to be congratulated, there was no reason to put any check upon the liberty of the pleader to so congratulate him, and that could not be held to be improper conduct: that may be so.

But this argument overlooks the main fact that while the proceedings were pending, it was improper for a pleader to express his opinion on such a point in the manner followed in this case. The position would have been different if the proceedings had not been pending.

I think, therefore, that a case is made out for notice being taken of the conduct of the opponents.

None of the opponents has expressed any regret either to the District Court or to this Court. It seems to me that opponent No. 1 who is an old pleader and as such expected to realise the significance and the bearing of such a resolution during the pendency of the proceedings, and who presided at this meeting, is more to blame than the other two opponents.

The other two opponents are much younger men, and it is conceivable that in their enthusiasm they allowed their feeling to get the better of their judgment. I do not desire to take any very serious action against the opponents and indeed if they had expressed their regret, I should have been even prepared to drop the idea of making any further orders against them. But it is impossible to allow transgression of this wholesome rule by officers of this Court to pass unnoticed.

After a careful consideration of the nature of the act, I think it will meet the requirements of the case if opponent No 1 is suspended from practice for 3 months, and opponents Nos. 2 and 3 are suspended from practice for one month each. I would order accordingly, and direct that the Sanads be submitted to the Registrar for the usual endorsement of the order. No order as to costs.

Crump, J—We are here concerned with the conduct of 3 pleaders practising at Ahmednagar. The facts are not disputed and are briefly as follows:—

In 1921 certain persons were tried by the Sessions Court at Dharwar, and convicted of being concerned in a breach of the public peace. The offence was of a political complexion, being connected with the Non Co-operation Movement. In the same year two persons Mahomed Ali and Shaukat Ali were prosecuted at Karachi for offences against the State, and another person named Gangadharrao Deshpande was prosecuted for a similar offence at Dharwar.

On the 24th October 1921 after the completion of the 1st of these 3 trials, and during the pendency of the 2nd and 3rd, a public meeting was held at Ahmednagar. The opponent No. 1 presided. At that meeting opponent No 2 moved a resolution and opponent No. 3 seconded it. That resolution has been set out in the judgment just delivered by the learned Chief Justice and need not be repeated.

The question is what is the meaning of that resolution. It has been suggested, indeed that was the explanation before the District Judge, that the resolution was intended to express admiration at the self-sacrificing spirit of these persons, without implying any approval of their aims or objects. That is the aspect of the matter which has been pressed upon us by Diwan Bahadur for opponents 2 and 3. But the words must be taken in their plain sense. The word "Leader" is alone enough to

show that the resolution was not one of congratulation alone but one of sympathy.

It would be a rare phenomenon for a public meeting to congratulate a person on a manifestation of self-sacrifice in a cause of which the meeting did not approve. I am, therefore, unable to accept the explanation which has been suggested, and to my mind the resolution goes very near to saying that the acts of which these persons stood charged were virtues and not offences.

But I do not propose to rest my conclusions on that aspect of the matter, even though continued loyalty is an express condition under which these opponents hold the office of pleader. I am prepared to concede much to Diwan Bahadur Rao's eloquent appeal to the right of free speech. The reasons why I hold that the conduct of these pleaders renders them amenable to our disciplinary jurisdiction is of a different nature.

We have heard somewhat lengthy arguments as to whether the conduct of these persons amounts to contempt of Court, but we are not sitting to determine that question. It suggests, however, the aspect in which the matter presents itself to me. It is as a public expression of opinion with reference to cases pending in Courts that the conduct of these pleaders appears to me objectionable.

To publicly glorify as a martyr a man who is on his trial, for that is the plain meaning of this resolution, must tend to hinder and embarrass the proper administration of justice. No appeal to the right of free speech can justify this. In my own country where the freedom of speech is as highly prized, as anywhere in world, the limitation is well-recognized, and has indeed found recognition more than once in our Courts.

Whether in this particular case we should have jurisdiction to deal with the conduct of these persons as contempt of Court, and whether that conduct amounts to contempt is, as I have said, not precisely the point before us. But that such conduct savours of contempt can hardly be denied.

But it is as pleaders that the opponents come before us. The office of pleader was created in furtherance of the administration of justice. Pleaders have privileges, but they have responsibilities also, and a pleader who acts so as to hinder and embarrass the administration of justice is to my mind guilty of "improper conduct" within the meaning of those words as used in section 26 of the Bombay Pleaders' Act XVII of 1920, and such conduct furnishes "reasonable cause" for the exercise of our disciplinary jurisdiction within the meaning of those words as used in section 25 of the same Act.

Holding as I do that the opponents have so acted, that is to say, that their conduct was such as tended to hinder and embarrass the administration of justice, I am of opinion that they have rendered themselves amenable to be dealt with under the disciplinary jurisdiction of this Court.

Now it has been argued that in any case a resolution passed in Ahmednagar at a public meeting could not affect the course of trials held at Dharwar and at Karachi. That is a plea in extenuation. But I am constrained to say two things: one, that this is not a solitary instance, and where there are a number of such meetings in different places, the course of justice is likely to be seriously embarrassed: another, that the habit of public comment on pending trials has become increasingly common and requires to be checked. Therefore I cannot regard the conduct of these persons as being no more than a venial error.

In this connection I may say that unfortunately we have no expression of regret from these opponents. Had such expression of regret been forthcoming, I might have been disposed to accept it as sufficient, and to trust to their good sense to avoid a repetition of conduct to which exception has rightly been taken.

As matters stand, I see no course left open to us but clearly to mark our disapprobation of this conduct in the manner suggested by my Lord the Chief Justice in the judgment just delivered. The order proposed is, I think, a lenient order, and I agree that there should be a lenient order as, so far as I am aware, this is the first case precisely of this kind which has come before this Court,

I trust that our expression of opinion will clearly demonstrate to those concerned that the habit of unrestricted public comment upon pending cases is one which we are unable to tolerate.

On these grounds I concur in the order proposed.

Order Accordingly.

A.I.R. 1922 Bombay 365.

MACLEOD, C. J. AND SHAH, J.

Vallabhadas Narayanji and another—Claimants-Appellants.

v.

Special Land Acquisition Officer for Railways and another—Respondents.

F. A. No. 125 of 1917 decided on 30th June 1921 from the decision of Asst. J, Thana.

Landlord and Tenant—Khot—Bhati land can be acquired by prescription by villagers—If such is acquired by Government — Compensation should be apportioned between Khot and tenant.

Certain Bhati lands were acquired under Land Acquisition Act for G. I. P. Ry. in villages Vikhroli and Kanjur. The Khot claimed the whole of the compensation. These grass lands have passed from hand to hand under sale deeds and the Khot was perfectly aware that the villagers were enclosing these grass lands and were treating them as if they belonged to them.

Held: it is impossible to say that the villagers could not acquire by such action proprietary rights in the lands so enclosed and dealt with. They were entitled to compensation along with the Khot according to the custom of the villages as appears from previous cases. The acquisition of right by prescription is open in law to these villagers against the Khot whatever his rights under the lease may be. 1879 P.J. 274 ; 1897 P.J. 9 ; Ref.

[P. 366, C. 2, P. 367, C. 1,2.]

R. W. Desai and *J. G. Rele*—for Appellants.

W. B. Pradhan—for Respondent.

Bahadurji and *S. S. Pathar*—for the Crown.

Macleod, C. J.—This is an appeal from the decision of the Assistant Judge of Thana in Reference No. 5 of 1915. In 1910, a strip of land on the east side of the G.I.P. Railway between Kurla and Thana was notified for acquisition in order that the line might be widened. This Reference refers to a portion of that strip situated in the Vikhroli village, and the lands in other companion references are all similar lands either in this village or in the village of Kanjur through which the line passes.

(His Lordship dealt with the sufficiency of the compensation and then proceeded as follows).

With regard to the apportionment of the compensation in those cases in which the claimants had proved that they were in occupation of *bhati* lands, in the proportion of one to the Khot and two to the occupant, the Khot claims to be entitled to the whole of the compensation, whether he was in occupation of the lands or not. This is a question which seems to have arisen, and must always necessarily be arising, in Salsette, in cases of compulsory acquisitions because there have been a number of instances in Salsette where what may be called Khoti grants have been made in old times by Government to various individuals in order to encourage better cultivation in the villages granted, and it has come to be understood that with regard to *Bhati* lands the compensation money should be awarded in the proportion of one to the Khot and two to the occupants.

It has been thought on principles of equity that the compensation money should be apportioned in this way, although the occupants may have proved that they had the right to occupy the grass lands and retain the whole of the produce without paying any assessment to the Khot. That being the case, I see no reason why any alteration should be made in the apportionment of compensation in which it has been proved that the lands in Reference were *bhati* lands, in the occupation of particular individuals who claimed the rights of occupancy.

[His Lordship then criticised the lengthy arguments on purely academical questions and proceeded as follows] There was no necessity to construe Bombay Regulation I of 1808, nor was there any necessity to consider clause by clause the lease to the Khot of the villages of Vikhroli and Kanjur. Whatever rights the Khots acquired under the lease between themselves and Government in 1837 to the waste lands in these villages, even assuming for the purposes of this case that they became absolute proprietors of the soil that would not prevent other persons acquiring rights against the Khot either permanent or otherwise under the general law.

I may take the opportunity here of pointing out how a great deal of

confusion has arisen in these cases and other similar cases which have come before the Courts by the use of the word "*warkas*."

Evidently the word "*warkas*" was originally applied to that land in the neighbourhood of rice lands from which the villagers procured from times immemorial rough grass and branches for the purpose of *rab* burning on the rice fields, and it is admitted that although the villagers or Sutidars in occupation of a particular area of rice land have a right to collect *rab* materials from the adjacent waste lands, they have no proprietary interest on account of that in the soil, so that in the case of those lands it might well be, if they were compulsorily acquired, the villagers or Sutidars would have no right to any part of the compensation.

The case of *Vasudev Bhaskar Pendse* v. *Collector of Thana* (1) has been referred to as showing that the villagers have no rights whatever in any waste lands, for whatever purposes they are used. But what was decided in that case appears at p. 286 :—

"The general conclusions at which we have arrived are these, *viz.*, that the holders of rice fields in the Konkan, whatever may be their tenure of such fields, are not proprietors of the soil in the '*warkas*' lands held by them ; and that they are not entitled either by custom, or prescription, or, (so far as appears in the present case), by any grant or recognition on the part of the Government to cut down teak, or other specially reserved trees growing on '*warkas*' lands of which they are the occupants. The plaintiff therefore cannot have a decree declaring him entitled to cut down such trees."

So that the distinction between *warkas* land, which could be considered as appertaining to the cultivation of rice fields, and waste lands producing grass, which are better styled *bhati* lands, was not dealt with in the judgment So it seems to me that that is a very good reason why the decision in *Harischandra* v. *Sorabji* (2) is not an authority in the case now before us.

The learned Judges considered that the question before them was concluded by the decision in *Pendse's* case (1). They say: "*Warkas* lands are waste lands and are therefore included in the grant made by the State of waste lands to the original grantee. The right to take *rab* from these lands for manuring rice lands confers no title to the soil or the trees growing in it, which remain the property of the grantee." Therefore in that case the Court was not considering *bhati* lands but *warkas* lands proper.

This question arose in First Appeal No. 149 of 1903 and No. 11 of 1904 with regard to *bhati* lands in Malad, and although the Khoti grant in that case may not have been worded in the same way as the Khoti grant in this case, the decision that *bhati* lands are distinct from *warkas* lands which are appurtenant to rice holdings is directly in point.

It comes to this, therefore, that as these *bhati* lands were included in the village of Vikhroli, it may be said they were included in the lease which Government granted to the Khot in 1837, and it might also safely be assumed that for centuries the villagers in Salsette have been accustomed to cut grass on the waste lands, it was required for feeding their animals or for sale. and it nowhere appears, at any rate in this village, that the Khot has ever interfered with those rights of cutting grass.

That of course by itself would not be sufficient to create anything in the nature of occupancy rights. But we find in these cases the evidence shows that a great deal more was done than merely entering on the land when the grass was ready to cut and removing the grass. These grass lands have been enclosed They have been sold by registered sale deeds. They have passed from hand to hand under these sale deeds, and the Khot was perfectly aware that the villagers were enclosing these grass lands and were treating them as if they belonged to them. In that state of affairs it is impossible to say that the villagers could not acquire by such action proprietary rights in the lands so enclosed and dealt with.

There is no suggestion in this case that these lands had not been so dealt with for a period of twelve years and upwards. It would follow, therefore, unless the Khot chooses to contest the question in a

(1) (1879) P. J. 274.
(2) (1897) P. J. 9.

regular suit by endeavouring to regain possession of grass lands of this nature, that the villager-claimants in these References have acquired an interest in the land in reference.

It is not necessary for the purposes of the Reference to define exactly what that right is. But it is certainly clear that they have been in possession of these lands, and have taken the profits of these lands, and have paid no assessment for them, and so they might certainly have made a perfectly good case for receiving the whole of the compensation.

But it has been recognised in other similar cases not only on the east side of the island but also on the west side that some residuary interest remained in the Khot which entitled him to share in the compensation, and as this question was not fought out before the Assistant Judge, and considering all the circumstances and recognition of this method of apportionment, I do not think there is any reason why it should be disturbed.

It evidently was in the past recognized as a compromise between the conflicting interests of the Khot and the villager occupants who had been accustomed to take grass for their own purposes from the grass lands without paying anything by way of assessment to the Khot. Therefore, I think, that is the ground on which all these References ought to be decided, and we make it clear that there was no necessity for the findings on various issues which were raised in the lower Court, in particular issues Nos. 1, 2, 3, 4 and 5.

[His Lordship then dealt with the other appeals and dismissed them with costs.]

Shah, J.:—I agree that all these appeals should be dismissed. I desire to state briefly the grounds upon which the two questions, first as to the market value of the various plots acquired, and second, as to the apportionment of the compensation, should be answered in the manner in which they have been answered by the trial Court in this case.

[His Lordship then dealt with the question of the value of the lands acquired and continued as follows.]

The main question in these appeals round which the arguments have ranged is the question of apportionment. The Khot claims the whole of the compensation in respect of these *bhati* lands. On the other hand the villagers claim to have a substantial interest in these *bhati* lands on account of long and continued user thereof adversely to the Khot and claim to be entitled to the compensation in respect of those lands.

It is not necessary for the purpose of deciding this question of apportionment to consider the points relating to the construction of Regulation I of 1808, nor is it necessary to deal with the general question as to whether under the lease the Khot did or did not acquire any right to the *bhati* lands or other waste lands. Whatever his right under the lease may be, it is quite clear that, if the occupants of the particular plots acquired can show that they have been in enjoyment of the respective plots for over twelve years and have enjoyed those lands in their own right there is no reason why they should not acquire the interest which they claim to have in those lands.

The acquisition of rights by prescription is open in law to these villagers against the Khot whatever his rights under the lease may be. The Government do not claim any interest in the land such as might go to reduce the market value of the land acquired under the Land Acquisition Act. The lower Court has considered the question of the enjoyment of each particular plot by a particular individual very carefully, and has dealt with that part of the case fully in the judgment.

In the course of the argument no attempt has been made on behalf of the Khot except in relation to a few plots to show that the conclusion of the lower Court on evidence with regard to the possession and enjoyment of each particular plot by each particular holder is open to any objection. These conclusions, therefore, must be accepted to be right with regard to the enjoyment and possession by particular villagers of the particular plots in question.

If we accept those findings, it is clear that the villagers, who are shown to have enjoyed and held these lands for a number of years to the knowledge of the Khot, and without any assertion on the part

of the Khot against their enjoyment, are entitled to a substantial share in the compensation. On that ground it is clear that the claim of the Khot to the whole of the compensation cannot be allowed. If once the conclusion is reached that the Khot is not entitled to the whole of the compensation in respect of each plot acquired, then as regards the apportionment between the Khot and the villagers there is not any serious difference between the parties.

In previous cases the occupants and the Khot have been held entitled to share the compensation in the proportion of 2 to 1. It is in the same proportion that the lower Court has directed the apportionment of compensation in their cases; and in spite of the desire of the occupants expressed through their pleader in the course of argument, for the first time, that they should get the whole amount, there is no reason whatever to think that that is not a fair and equitable apportionment under the circumstances.

The fact that they have filed no cross-objections, and have raised no objection in the lower Court to allow the compensation to be divided in that proportion goes a great way to show that they have all along understood their rights to be as determined by the lower Court. That proportion has been accepted in some of the earlier decisions of this Court with regard to the Bhati lands, and that proportion, I think, may properly be accepted in these cases.

I desire to add a word with reference to the decision in *Harischandra* v. *Sorabji* (2) which has been relied upon by Mr. Desai as showing that all these *bhati* lands are on the same footing as the *warkas* land, and that no length of enjoyment of such lands would give any right of ownership over the same to the holder. I do not think that that decision has any such effect. That case was decided really on the evidence in that case; and it is pointed out that in the absence of any evidence the learned Judges declined to assume that the Sutidars as such had become the owners of the soil in the *warkas* land.

They referred to the case of *Vasudev Bhaskar Pendse* v. *The Collector of Thana* (1) in the judgment. It is clear to my mind that neither that case nor *Pendse's case* (1) helps the Khot in the present case, because the lands with which we are concerned are not exactly of the class of *warkas* lands with which the Judges were concerned in that particular case; nor can I accept those cases as laying down the general proposition, which it is contended they do, that in no case can *warkas* land be acquired by the holder by adverse possession against the Khot.

But in the present case, we are not concerned with the effect of these decisions on what may be described as proper *warkas* land. These *bhati* lands stand on the same footing for the purpose of acquisition of rights by prescription as ordinary lands; and I see no reason why these villagers who have been enjoying the produce of these grass-growing lands, should not have the benefit, which the law gives to such occupation and enjoyment, as against the Khot.

As regards the few lands, as to which Mr. Desai contended that the acquisition of rights by adverse possession was not established, I am of opinion that he has failed to show that the conclusion reached by the lower Court is wrong.

Appeals dismissed.

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MACLEOD, C. J. AND SHAH, J.

Emperor—Prosecutor

v.

Shanker Balakrishna Deshpande—Accused Opposite Party.

Cr. Ref. No 8 of 1922, decided on 29th March 1922. reference made by Asst: Judge, Thana.

Criminal P.C.S. 307—Want of sanction under S. 195 does not bar interference by High Court under S 537.

The fact that there was a want of necessary sanction before the prosecution was instituted is no ground for the High Court to decline to interfere in reference, if no failure of justice has been occasioned. The words of S. 307 (3) are wide enough to cover the limitations which exist upon High Court's powers in dealing with appeals under S. 537.

S. S. Patkar, Government Pleader—for the Crown.

Amin and *A. R. Gadkari*—for Accused

Macleod, C. J.—This is a reference by the Additional Sessions Judge of Thana under S. 307, Criminal Procedure Code. The two accused were charged before the Additional Sessions Judge sitting with a Jury under S. 467 or Ss. 467 and 109 or S. 114, Indian Penal Code. It was alleged that they

had forged the will of one Kashinath Shanker, deceased, or had abetted the forgery thereof.

The Jury disagreed, three were in favour of an acquittal, and two were of opinion that both the accused were guilty of abetment of forgery. The Judge, in making the reference, has expressed the opinion that both the accused were guilty, and has given his reasons therefor.

At the outset a point of law has been raised founded on the fact that no sanction was obtained prior to the prosecution. The will, which it is alleged was forged, was produced on the 19th October 1920 by the first accused in the Small Cause Suit No. 824 of 1920. No objection was taken at the trial on the ground of want of sanction, and if the accused had been convicted, and had filed an appeal to this Court, there can be no doubt that under S. 537, Criminal Procedure Code, that sentence could not have been reversed or altered for want of, or any irregularity in, any sanction required under S 195 unless such want of irregularity had occasioned a failure of justice.

But it has been argued that because the case comes before us under S. 307, S. 537, is not applicable. Under S. 307, sub-section (3):—

"In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of Sessions Judge and the Jury, acquit or convict the accused of any offence of which the Jury could have convicted him upon the charge framed and placed before it."

The whole case, therefore, is open to the Court when hearing a reference under S. 307, Criminal Procedure Code, and in dealing with the reference, the Court exercises all the powers which it exercises on an appeal. But it would not have the power, if it were an appeal, of dealing with the case by altering or reversing the finding, sentence or order passed by a Court of competent jurisdiction for want of, or any irregularity in, any sanction required by S. 195, Criminal Procedure Code, unless such want or irregularity had occasioned a failure of justice, and it would appear to follow that it is not competent to this Court to take any action in consequence of a want of sanction which would take the form of an order quashing the whole of the proceedings and directing a retrial since we do not think that any failure of justice has been occasioned.

Such being the case, I think that we are entitled, although S. 537, Criminal Procedure Code, does not directly apply to a reference under S. 307, to hold that the fact that there was a want of necessary sanction before the prosecution was instituted is no ground for our declining to interfere in this reference. (Agreeing with the S.J. on the merits of the case his Lordship convicted the accused under S. 467 read with S. 109, I.P.C and sentenced them to two years rigorous imprisonment and 6 months simple imprisonment respectively.)

Shah, J.—I agree. I have nothing to add as regards the merits of the case.

I desire to deal briefly with the point of law which has been raised for the first time in this reference on behalf of the accused. The point is that as the will was produced in a civil suit, and as no sanction was obtained as required by S. 195, Criminal Procedure Code, the Court could not take cognizance of his offence. Admittedly this point was not raised either before the Committing Magistrate or before the trial Court, and the whole question is whether it is open to us to give effect to it at this stage, when the case is before us on reference under S. 307, Criminal Procedure Code

It is clear from the provisions of S. 537 that in appeal we could not reverse or alter any finding, sentence or order passed by a Court of competent jurisdiction for want of any sanction required by S. 195, unless we were satisfied that such want had occasioned failure of justice. The section does not in terms apply to a reference under S 307. But S. 307, sub-section (3), provides that "the High Court may exercise any of the powers which it may exercise on appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury, acquit or convict the accused of any offence of which the Jury could have convicted

him upon the charge framed and placed before it."

It seems to me that these words are wide enough to cover the limitations which exist upon our powers in dealing with appeals. As the section provides that subject to the powers which we may exercise in appeal, we have to acquit or convict the accused, I think it is necessarily implied that what we cannot do on appeal in virtue of the provisions of S 537, we cannot do on reference under S 307.

The point is not free from difficulty, as we have to infer by implication a limitation on our powers as regards procedure and as the Legislature has omitted to provide in terms for such a case, though there is express provision as regards cases coming up for confirmation of sentences or by way of appeal or revision before this Court But I think the implication is clear, and I do not see how we can refuse to give effect to that opinion in view of the terms of sub-section (3) of S. 307.

Subject to the powers which we may exercise on appeal this Court must consider the entire evidence, and after giving due weight to the opinions of the Sessions Judge and the Jury either acquit or convict the accused. I think therefore, that the limitation contained in S. 537 applies to proceedings under S. 307. It is not suggested in this case that the want of sanction has occasioned any failure of justice.

It is unfortunate, however, that the need for sanction, which was obvious, was not realised by the complainant or by the prosecution or by the lower Courts in time. I do not think that the want of sanction has any effect upon the present proceeding now.

Conviction and sentence confirmed.

A. I. R. 1922 Bombay 370.

MACLEOD, C J. AND SHAH, J.

Motilal Hirabhai and others—Opp. Party—Appellants.

v.

Bai Mani—Applicant Respondent.

F. A. No 25+ of 1918 decided on 6th September 1921 from the decision of 1st Class Sub. Judge, Ahmedabad.

(a) *Execution—Construction of decree—Execution Court cannot deal with matter not dealt with by trial Court.*

The mere fact that the plaintiff prayed that the shares with all subsequent issues should be transferred to him on payment of mortgage money of the shares mortgaged does not give the execution Court power to deal with subsequent issues, if there was no evidence before the trial Court of sub-equent issues and if it could not be said that they were mentioned in the suit. [P. 372, Col. 1.]

(b) *Mortgage—Shares—Fresh capital — Sub-shares whether accretion depends upon whether it is treated as capital or dividend.*

Whether, a mortgagee of shares being in the same position as a life tenant, any accretion to the mortgaged shares by the issue of fresh capital must be treated as belonging to the corpus depends on whether accumulated profits are distributed as dividend or converted into capital If a sum which is entered in the balance sheet to the credit of the Reserve Fund is transferred from the Reserve Fund to the Capital Account and new shares issued to the existing share-holders, it may be said that there is a distribution of capital and the life-tenant can only get the interest on the new shares, but if the share-holders, prefer instead of getting dividends paid to them in cash, the amount to the credit of profit and loss account available for payment of dividends in a particular year should be transferred to the capital account and new shares issued in respect thereof, clearly there is a distribution of dividends, and the life-tenant would be entitled to retain the new shares. The accident of certain shares having been transferred to life-tenant as security for the loans makes no difference to the rights of the parties to the shares apart from the mortgage. *Bouch* v. *Sproule* (1887) 12 App. Cas. 385; (1894) 3 Ch 573 Foll.

[P. 372, C 1, 2.]

(c) *Civil P. C., S. 47—Need not be strictly construed*

Per Shah J:—It is not necessary to put a strict construction upon the terms of S. 47, so as to exclude the consideration of a question which is closely connected with the subject matter of the decree. [P. 374, C. 2]

Coyajee with *G. N Thakore* and *H. V. Divatia*—for Appellant.

Bahadurji and *N. K Mehta*—for Respondent.

Macleod, C. J.:—This is an appeal by some of the defendants in Suit No. 675 of 1918 in the First Class Subordinate Judge's Court at Ahmedabad against an order passed by the Subordinate Judge in Darkhast No. 96 of 1919 issued by the successful plaintiff in execution of his decree. That decree provides as follows: "The plaintiff do pay Rs. 11,939-15-0 to defendants Nos. 1 to 5 and redeem from them the mortgaged shares, together with the issues mentioned in the suit and the defendants Nos. 1 to 5 do on receiving the above sum get the said shares transferred to the name of the plaintiff in the books of the defendant No. 6 Company." This decree was confirmed on

appeal to the High Court.

In order to understand the questions which are at issue in this appeal it will be necessary to set out the facts relating to the mortgage which was sought to be redeemed in that suit. The plaintiff was Mani, the daughter of one Girdharlal Dalpatram, who had a dispute with one Achratlal regarding the ownership of forty-eight shares in the Ahmedabad Ginning and Manufacturing Company. That dispute was settled by arbitration As a result twenty-four shares were transferred by Girdharlal to Achrathal, the remaining twenty-four were to remain in the name of Girdharlal but he was only to retain Rs..1,100 out of the dividends; the balance being payable to Achratlal and Gulab his mistress.

In 1883 Girdharlal in consideration for Rs. 7,500 borrowed from Achratlal transferred to the latter five out of the twenty-four shares retained by him, Girdharlal, under the arrangement of 1883. Achratlal died in 1885 and thereafter Girdharlal not having paid the excess dividends over Rs. 1,100 to Gulab borrowed Rs. 4,439-15-0 from the trustees of Achratlal on the same security.

Thereafter the trustees continued to receive the dividends on the shares. Gulab is now dead and Girdharlal is entitled to the shares and all dividends declared thereon on redemption of the mortgage. The principal issue in the suit was on what terms the plaintiff should be allowed to redeem. The defendants claimed to retain the dividends without an account being taken and also to be entitled to interest on the principal debt.

The trial Court held that the plaintiff should be allowed to redeem on payment of the principal debt without any account being taken of interest or dividends. It is important to note that throughout the judgment the Subordinate Judge refers to the mortgaged property as consisting of five shares which were numbered in the plaint 266 to 270. The original face value was Rs. 1,000 for each share.

It is admitted, however, that before 1883 for each original share a sub-share of Rs 500 had been issued, although Beaman, J. in his judgment refers to the face value of the five shares as amounting to Rs. 7,500, as if in some way or other the sub-shares were considered as increasing the face value of the original shares. These sub-shares presumably were transferred to Achratlal although they are nowhere referred to in the judgment, but the decree allows redemption of the mortgaged shares together with the issues mentioned in the suit.

It is these last words which have formed the foundation for the present dispute. The five shares numbered 266 to 270 with their five sub-shares existing at the date of the mortgage of 1883 constituted the mortgaged property, as stated in para. 4 of the plaint But in the prayer of the plaint the plaintiff asked for an account to be taken and for a direction that on payment being made the five shares in dispute as also the issues thereof that there might be *at present*, should be transferred to the plaintiff's name. There was no averment that any fresh issues had come into existence after the mortgage.

Now in 1886 certain special resolutions were passed by the Company, to the effect that—

(1) The capital of the Company should be increased by Rs. 5,25,000 to be called B capital divided into 350 whole shares of Rs. 1,000 and 350 half shares of Rs. 500. To those of the present shareholders who had a whole share of Rs. 1,000 one whole share of B capital was to be given and to those who had a present half share of Rs. 500 one half share of Rs. 500 of the B capital was to be given.

(2) At the time of declaring a dividend the share-holders should be paid a dividend at the rate of 6 per cent. in cash and the rest should be credited in the certificate for call.

We have been given to understand that the B capital has been fully paid up out of dividends declared in excess of 6 per cent. but there is nothing on the record of the suit or of the Darkhast to show by what instalments the B capital became fully paid up.

Considering that it was perfectly well known that the trustees of Achratlal, by reason of five shares 266 to 270 and their five sub-shares, representing A capital, standing in their name, had become the holders of five whole shares and five sub-shares of B capital, it is almost incredible that the

question whether the B shares should also be transferred on payment of the principal debt should have passed unnoticed. Even the five sub-shares of A capital are nowhere specifically referred to. It was eminently a question to be decided in the suit and not in execution proceedings. The execution Court can only give effect to the decree as it stands.

The defendants have to transfer to plaintiff the mortgaged shares with the issues mentioned in the suit, but there is no mention of B shares throughout the proceedings except in Exhibit 14 referred to by the learned Judge below. If they had been referred to in the course of the suit then it might be said that the execution Court might order all shares and subshares issued after the mortgage to be transferred after ascertaining what shares had been so issued.

But the mere fact that the plaintiff prayed that all subsequent issues should be transferred does not give the execution Court power to deal with subsequent issues, if there was no evidence before the trial Court of subsequent issues and it could not be said that they were mentioned in the suit.

We do not even know whether the subshares of A capital which are mentioned in the special resolution of 1886 as half shares bore the same numbers of the corresponding whole shares or were given fresh numbers. But as far as we can gather from the meagre information on the record the calls on the B capital were paid by means of dividends which would otherwise have been paid to the holders of the A capital, their dividends in the meanwhile being restricted to 6 per cent.

Eventually, therefore, the mortgagee instead of getting Rs. 7,500 in cash as dividend in excess of the 6 per cent. actually paid on the A capital mortgaged, became the owner of fully paid shares of B capital. In any event, it might be argued that the mortgagor would not be entitled to have these shares transferred to him without an account being taken of the amount of dividend which was utilised in paying the calls on the shares instead of being paid in cash to the mortgagee.

But this Court has decided that the mortgagor is not entitled to an account of the dividends as he was not liable to pay interest on the loan. It would seem, therefore, that if the question had been considered at all in the suit proceedings the mortgagor could at the least have been directed to pay Rs. 7,500 before he would get back the B shares, but obviously that is not an order which can be made in execution.

It has been contended that a mortgagee of shares is in the same position as a life-tenant, and that any accretion to the mortgaged shares by the issue of fresh capital must be treated as belonging to the corpus but as pointed out by Lord Herschell in *Bouch* v. *Sproule*, (1) that depends on whether accumulated profits are distributed as dividend or converted into capital.

If, as in that case, a sum which is entered in the balance sheet to the credit of the Reserve Fund is transferred from the Reserve Fund to the Capital Account and new shares issued to the existing shareholders, it may be said that there is a distribution of capital and the life-tenant can only get the interest on the new shares, but if the share-holders prefer that instead of getting dividends paid to them in cash, the amount to the credit of profit and loss account available for payment of dividends in a particular year should be transferred to the capital account and new shares issued in respect thereof, clearly there is a distribution of dividends, and the life tenant would be entitled to retain the new shares. But we have to endeavour to ascertain what was actually decided by the Court which passed the decree.

The learned Subordinate Judge in allowing the plaintiff, under the terms of the decree to redeem the B capital as well as referred to Exhibit 14 (which seems to be a mistake for Exhibit 78) in the suit which was a statement brought in by the defendant of the dividends of the five shares received after *Bhadarva* 1939. It contains the dividends on the five shares and subshares in existence at the date of the mortgage as also of the five shares and five subshares of B capital.

He deduces from that statement that the defendant did not claim the B capital shares themselves as representing payment of dividends. He also

(1) (1887) 12 A. C. 385 = 56 L. J. Ch. 1037 = 36 W. R. 193 = 57 L. T. 345.

points out that the mortgagee had always treated the B shares as part of the property mortgaged, and that when the mortgagor prayed for redemption of the five shares with all the issues thereof up to the date of the suit, no objection was made to the claim by the defendants in their written statement, and as the five mortgaged shares mentioned in the decree clearly included the five A sub-shares without mentioning them, they also must be taken as including the five whole and five half shares of B capital.

There is considerable force in this argument. If there was no evidence at all on the record from which it could be deduced that the learned Judge was aware of the issue of B capital it might be said that the mortgaged shares referred only to A capital but with Exhibit 78 before him the learned Judge was aware of the B Capital and yet throughout the case the mortgaged property is referred to as the five shares. If the defendants when asked to bring in an account of the dividents made no claim to include the B shares as representing dividends but only mentioned the dividends on the B shares, and if they allowed the mortgaged property to be referred to throughout as the five shares Nos. 266 to 270, I think it may fairly be assumed that it was so obvious to the Court and to the parties that the B shares were accretions to the A shares that no one thought of taking the precaution of stating that as a fact.

I should prefer to take this view, rather than the opposite one, that both parties understood that the B capital should be treated as dividends, so that it was not necessary for the Court to make it clear that only the A capital could be redeemed.

I think the appeal should be dismissed with costs.

Shah, J:—After stating the facts about the 'mortgage' of the shares, the issuing of sub-shares, the decree in plaintiffs' suit to redeem and execution proceedings his Lordship proceeded). The defendants have appealed to this Court and it is argued on their behalf that the decree does not refer to these new shares and that the plaintiff is not entitled to them, as the High Court must be deemed to have by necessary implication negatived their claim to them.

It is further urged that the question arising between the parties with reference to these new shares cannot be dealt with in execution; that these shares represent the dividends of the old shares and not an accretion to capital that they should go to the representatives of Achratlal and Bai Gulab and not to the plaintiff, and that in any case the plaintiff should pay back the original profits used by the Company in paying up the calls of the new shares.

On behalf of the respondent it is urged that the terms of the decree are wide enough to cover these new shares, that the decree should be interpreted in the light of the prayer clause whereby she claimed five shares with all the issues in relation thereto up to the date of suit which would include the new shares of the B capital now in question.

It is also urged that the defendants never raised the contention that they were entitled to these shares of the B capital even though they contended that they were entitled to all the profits of the old shares and were in no way liable to account for the same, and that the point must be deemed to have been decided against them by implication.

It is also urged on her behalf on merits that these new shares formed an accretion to the capital and that as between the remainderman and the life-tenant, on the expiry of the interest of the life-tenant, the shares must go to the remainderman, according to the principle of the decision in *Bouch* v. *Sproule* (1).

As regards the first question relating to the construction of the decree, it is by no means free from difficulty. In the plaint no express reference was made to these shares of 1886 though the fact must have been known to the plaintiff. In the prayer clause, however, 'the five shares Nos. 266-270 together with the issues thereof that there may be at present' have been referred to. In the written statement the original five shares are referred to, but no contention is raised as to the new shares of the B capital.

The judgment of the trial Court is silent and so are the judgments of the High Court on the question. At the same time it may be mentioned that the

trustees filed a statement (Exhibit 78) of the dividends received from time to time, in which they showed the dividends not only on the old shares of the A capital but also on the new shares of the B capital.

They however, did not show the new shares as forming part of the dividends received. The question was not raised on either side and the expression either 'mortgaged shares' used in the judgment of the trial Court and the words 'the mortgaged shares together with the issues mentioned in the suit" are not clear enough to place the matter beyond controversy. Having regard to the importance of the point and the absence of any evidence as to whether the shares represented the dividends on the old capital, it is difficult to hold that the decree gave to the plaintiff something, to which no express reference was made in the judgments or in the pleadings.

The proceedings in the suit do not throw any light on the meaning of the words used, and the words used in the decree are capable of being interpreted in either sense. The 'mortgaged shares' might include the accretion to the shares: but where the question, whether the new shares were an accretion to capital, has not been raised and decided on its merits, I do not think that under the terms of the decree the new shares could be held to be included in the expression 'mortgaged shares.'

As regards the point that the question must be deemed to have been decided by implication, I do not see how it could be treated as having been decided against the plaintiff. There is some force in a similar contention urged on behalf of the plaintiff against the defendants. Though the new shares were not expressly mentioned in the plaint, the words used in the prayer clause were clearly wide enough to include them.

The trustees might have, and it may be said with some justice, ought to have raised the point as to the new shares; and if they did not raise it, it must be deemed to have been decided against them. After a careful consideration of the question and taking into consideration the attitude of the trustees as indicated by the statement of accounts filed by them in the suit, I am not satisfied that the effect of the omission on their part to raise the question ought to be pressed against them to the extent of holding that the point must be deemed to have been decided against them by implication. It would be reading the moffussil pleadings with a strictness which might work injustice and which under the circumstances of this case I must decline to do.

The question then arises whether the rights of the parties to the new shares could be determined in these proceedings.

I think they could be determined. The words of the decree are not unequivocal: and under the circumstances the question whether the new shares are an accretion to the mortgaged property appears to me to be a question relating to the execution, discharge or satisfaction of the decree. The scope of the inquiry in the execution proceedings must be determined with reference to the terms of S. 47 of the Code of Civil Procedure; but it is not necessary to put any strict construction upon that section so as to exclude the consideration of a question which seems to be so closely connected with the subject-matter of the decree.

Further, under S. 47 it would be open to us to treat the proceeding as a suit, if necessary, under S. 47 subject to the conditions mentioned in that section. I do not think, however, that it is necessary to adopt that course in this case.

In connection with this question, I must say that the evidence adduced by the parties is meagre. As to the proceedings of the Company, there is a *purshis* put in by the defendants which gives some information as to the way in which the new capital was raised and the new shares issued.

But the difficulty of deciding a question of fact of this nature has been pointed out in various English cases, of which *Bouch* v. *Sproule* (1) is a type. We have to consider the provisions of the settlement of 1883, and the statement of accounts filed by the trustees.

I should have preferred to have the copies of the Articles of Association and of the resolutions of the Company with reference to the B capital and the way in which the calls were made in respect of the new shares. It is need-

less, however, to delay these proceedings any further: neither party has asked for any further opportunity to adduce evidence on this question.

According to the terms of the settlement of 1883 as also on the findings of the High Court in the appeals from the trial Court's decree, it is clear that Achratlal and Bai Gulab had only a life-interest in the old five shares and that ultimately they were to belong to Girdharlal or his heirs subject of course to the mortgage right created subsequently by Girdharlal in favour of Achratlal.

Thus all the dividends would go to Achratlal and Bai Gulab and the old shares would absolutely belong to the plaintiff, after the mortgage amount was paid. The accident of the shares having been transferred to Achratlal as security for the loans makes no difference to the rights of the parties to the shares apart from the mortgage. It is clear that the old shares carry with them the right to the allotment of the new shares.

For instance it is difficult to hold that if the shares had not been mortgaged and transferred to Achratlal and had continued in the name of Girdharlal, the new shares could have been or should have been issued to Achratlal as part of the profits of the old shares and it is not suggested on behalf of the defendants that in respect of the remaining nineteen shares or such of them as continued in the name of Girdharlal, the trustees of Achratlal have or could have claimed the shares of the new capital B issued to Girdharlal as part of the dividends which were claimable by them under the settlement.

The right to be allotted the new shares went with the old shares; and I find nothing on the record to support the view that the new shares formed part of the dividends in respect of the old shares. The evidence as to how the calls were received is not clear; but it seems to me to be a fair inference under the circumstances that the profits of the Company were capitalized and that the new shares were allotted to the holders of the old shares as part of the capital and did not represent the dividends on the old shares.

At any rate the trustees have produced no evidence to show that that is not the correct inference. On the contrary their statement of the profits received shows that the new shares were not treated as part of the dividends received on the old shares. It is very doubtful whether under the terms of the settlement, apart from the mortgage, Bai Gulab could have claimed the dividends on these new shares as part of the dividends on the old shares during her life-time from Girdharlal.

The money was advanced to Girdharlal on the security of the old shares; and the new shares, as I understand the effect of the Company's proceedings, were an accretion to the old shares. The title to these shares would follow the title to the old shares; and in my opinion the plaintiff is entitled to claim them. The special resolutions of the 5th September 1886, a printed copy whereof has been produced before us, also show that in substance what the Company did was to capitalize the profits.

No doubt the question would arise as to whether there is any equity in favour of the trustees as regards the amount of the shares which but for the capitalization of the profits the Company might have been distributed as dividends on the old shares. The trustees had the benefit of the security afforded by the new shares during the continuance of the mortgage, and the question of their right to the profits of these shares as forming part of and going with the profits of the old shares has already been decided in the suit in favour of the trustees.

I do not think, therefore, that there is really any equity in their favour, and if the profits were capitalized by the Company, I do not see how the defendants can claim those profits on the footing that if they had not been capitalized they would have been distributed as dividends on the old shares. I do not think that under the circumstances the principle underlying the decision in *Mulam* v. *Hitchens* (2) can apply to this case.

I, therefore, concur in the order proposed by my Lord the Chief Justice.

Appeal dismissed.

(2) (1894) 3 Ch. 578=13 R. 38=63 L. J. Ch. 797=71 L. T. 655.

A. I. R. 1922 Bombay 376.

(FULL BENCH)

MACLEOD, C. J., AND SHAH AND FAWCETT, JJ.

Hiralal Motichand—Plaintiff

v.

Ganpat Lahanu and others—Defendants.

Civ. Ref. No. 19 of 1920 decided on 1st July 1921 reference made by Sub-J. Ahmednagar in C. S No. 317 of 1920.

Court Fees Act, S. 17—Suit for balance on account—Court fee is payable not on each item but on aggregate balance.

In a suit for a balance due on a *Khata* which would ordinarily contain a number of items, each item does not constitute a distinct subject. The subject matter of the suit is the balance due on the account and, therefore, in such a case the Court fee payable is the Court fee on the aggregate amount and not on each item in the *khata*. [P 376, C. 2.]

S. R. Gokhale:—In support of the Reference.

K. N. Koyajee:—To oppose the Reference.

Macleod, C. J.—This is a reference by the First Class Subordinate Judge of Ahmednagar. The plaintiff sued to recover from the defendants nine items which stood debited in the *khata* of the defendants in the plaintiff's books and which still remained undischarged after giving credit for the amounts paid by the defendants in discharge of the previous items of debit.

It seems clear that the suit really was for the balance due on an account. The question was raised whether the Court-fees were not chargeable as if each item was a distinct subject so that the aggregate amount of 'fees' should be calculated as if a separate suit had been filed for each item.

In the case of *Ramachandra* v. *Appaji* (1) the plaintiff sued to recover a sum of Rs. 63-10-6 as the balance due to him by the defendant on a *khata*, 'alleging that the amount claimed represented the aggregate sum payable in respect of seven separate transactions which took place on different dates.'

The Subordinate Judge referred the following question to the High Court—Whether the plaint was sufficiently stamped when it bore stamps of the aggregate value of the amount sued for and, if not, what additional stamp ought it to bear. The Court decided that the several items in the *khata* constituted "distinct subjects" within the contemplation of section 17 of the Court Fees Act and were not connected so as to form one subject.

A similar question arose in a very similar case, *Vithal las* v. *Narayan*, [(1901) Civil Reference No. 9 of 1901, decided by Jenkins, C. J., and Chandavarkar, J., on the 26th September 1901] where the plaintiff sued to recover on a *khata* a principal amount of Rs. 15-1-3 with interest. The Judges said there that the plaintiff had brought a suit upon the transactions noted in Schedule I, II and III. The plaintiff paid Court fees on the aggregate amount, and not on each transaction sued upon.

The case of *Ramachandra* v. *Appaji* (1) was referred to and must have been before this Court when the reference was heard. But the Court, consisting of Sir Lawrence Jenkins and Mr Justice Chandavarkar, was of opinion that the Subordinate Judge was wrong in thinking that the Court fees should be charged on each item, as the suit did not embrace two or more subjects, but only one. No reference was made in the judgment to the case of *Ramchandra* v. *Appaji* (1) as the Court may have considered that they were not differing from the decision in that case.

But it seems that some doubt has arisen in the mind of the Subordinate Judges as to how Court fees should be calculated in the case of a suit for a balance due on an account: and it is desirable that there should be an authoritative decision on the subject. It seems to me in a suit for a balance due on a *khata* which would ordinarily contain a number of items, each item does not constitute a distinct subject. The subject matter of the suit is the balance due on the account and, therefore, in this case the Court-fee payable was the Court-fee on the aggregate amount and not on each item in the *khata*

Shah, J.—I agree.

Fawcett J.—I agree.—I think the general principle applicable is that laid down in *Grimbly* v. *Aykroyd* (2) and *Bonsey* v. *Wordsworth* (3), which was

(1) (1892) P. J. 271

(2) (1847) 17 L.J., Ex. 157=1 Ex. 479 =12 Jur. 357.

(3) (1856) 18 C.B. 325=25 L.J.C.P. 205=2 Jur. N. S. 494=139 E. R. 1295=4 W. R. 566=107 R. R. 718

followed in *Anderson Wright and Co.* v. *Kalagarla Surjinarain* (4) and *Kedar Nath* v. *Dinobandhu Shaha* (5). This is that where a tradesman has a bill against a party for any account in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided.

In the present case, separate items, which make up the amount of the balance due, are connected in this way, so that there is one cause of action and it follows that there is only one subject in the suit, which does not, therefore, embrace "two or more distinct subjects" within the meaning of Section 17 of the Court Fees Act. *Answer accordingly.*

(4) (1886) 12 Cal. 339.
(5) (1915) 42 Cal. 1043=31 I. C. 626 =19 C. W. N. 724

A. I. R. 1922 Bombay 377 (1)

MACLEOD, C.J., AND SHAH, J.

Sunder Spinner—Applicant-Appellant.

v.

Makan Bhula—Opposite Party-Respondent.

Civ. Extra. Application No. 34 of 1921 decided on 24th June 1921 from an order of First Class Sub. J., Surat in S. No. 433 of 1920.

Civil P. C., O. 9, R. 13 and O. V, R. 20—Service of summons by registered letter—Ex parte *decree*—*Defendant alleging non-service is entitled to retrial.*

Service by registered post is at any time a poor substitute for personal service, which is directed by the Code. It is allowed to litigants as a matter of convenience If defendant represents to the Court that he had not been offered the postal packet, he is entitled to retrial where an *ex parte* decree has been passed.

G. N. Thakor—for Applicants.

Ratanlal Ranchhoddas—for Opponent.

Macleod, C. J.—We need say no more in this case than that the defendant, on representing to the Court that he had not been offered the postal packet, was entitled to a re-trial. Service by registered post is at any time a poor substitute for personal service, which is directed by the Code.

It is allowed to litigants as a matter of convenience. But when sitting on the Original Side I have invariably allowed a defendant a re-trial, if, after the decree had been passed against him on evidence that the summons was sent by registered post and returned refused, he appeared and denied that the packet had ever been delivered to him by the postal authorities.

Rule will be made absolute.

Costs costs in the cause.

Shah, J.—I agree. *Rule made absolute.*

A.I.R 1922 Bombay 377 (2).

MACLEOD C. J. AND SHAH, J.

Krishnaji Shridhar Barde—Applicant—Appellant.

v.

Mahadeo Sakharam Patil—Opponent—Respondent.

Civ. Extra. Application No. 80 of 1921 decided on 28th June 1921, from an order passed by Judge of S. C. Court, Poona, Application No. 474 of 1920 in Arbitration Case No. 1 of 1920.

Civil P. C., S. 39—Award—Court which can execute award can transfer it for execution—Bombay Co-operative Societies Act 1912, S. 43, R. 34.

A Court which has the power to execute an award under R 34 framed under S. 43, Bombay Co-operative Credit Societies Act has the power to transfer it for execution to another Court.

J. R. Gharpure—for Applicant.

Judgment.—In this case an award was made by an arbitrator in a dispute between certain parties, the arbitrator being appointed by the Registrar of Co-operative Credit Societies as provided by the rules under the Co operative Credit Societies Act II of 1912. As one of the opponents resided in Bombay, or had gone to Bombay, the petitioner applied to the Court of Small Causes at Poona for a certificate transferring the decree for execution to the Court of Small Causes at Bombay.

The rules passed under Section 43 of the Bombay Co-operative Credit Societies Act provide under rule 34 that the decisions and awards under rule 31 shall, on application to any Civil Court having local jurisdiction, be enforceable in the same manner as a decree of such Court.

The learned Judge dismissed the application on the ground that under Section 39 of the Civil Procedure Code, it was only the Court which had passed the decree that could give a certificate under that section. It seems to us that that is a somewhat narrow construction of Section 39, as the petitioner could apply to the Poona Court to execute the decree as if the Poona Court had passed it, and the next step would be that if the Poona Court could exe-

cute the decree as if it had passed that decree, then it could transfer that decree under Section 39, Civil Procedure Code.

Therefore, the rule will be made absolute. The order dismissing the application with costs must be set aside, and the petitioner's costs will be costs in the execution.

We may add that rule 34 is not very clearly worded. If it means that a party who has obtained an award can execute it in a number of different Courts, that would certainly be contrary to the scheme of the Civil Procedure Code which provides that the Court which passes the decree shall execute it, and, if required, shall send the decree for execution to another Court under the provisions of Section 39, with the result that the execution of the decree really proceeds in the Court which passes the decree, whereas if the decree is being executed in half a dozen Courts, it would be impossible for those Courts to know what had been done outside their own jurisdiction.

Rule made absolute.

A.I.R. 1922 Bombay 378

MACLEOD, C. J. AND SHAH, J.

Baswantappa Irrappa Desai and others—Plaintiffs-Appellants.

v.

Bhimappa Yellappa Koppad and others—Defendants-Respondents.

S. A. No. 616 of 1920 decided on 15th June 1921 from a decision of D. J., Dharwar, in A. No. 124 of 1918.

Easements Act, Ss. 15, 17 (c)—Right to receive water falling on higher land—Can be acquired by prescription.

Although it is quite possible that the owner of one piece of agricultural land might acquire the right to drain his water on to the land of another, it would be more natural in hilly districts for the owner of the lower land to acquire a right to receive water which either falls on or flows into the higher land. It is only in such a way that cultivation in such districts can proceed; and nothing will prevent the owner of the land on the lower level from acquiring by prescription such a right against the owner of the land on a higher level.

[P. 379, C. 1, 2.]

A. G. Desai—for Appellants.

Nilkanth Atmaram—for Respondents.

Macleod, C. J.—The plaintiff sued for a permanent injunction restraining defendants Nos. 1 to 4 from interfering with the plaintiff's right to get water from the land either in the ownership or occupation of the defendants, and Rs. 25 as damages Exhibit 37 is the map prepared by the Commissioner, which correctly shows the position of the various Survey Numbers mentioned in the case and the water channels. Defendant No. 4 is the owner of Survey No. 91, but has let that Survey Number to defendants Nos. 1—3, who are also the owners of Survey No. 4. The plaintiff was the owner of Survey Nos. 92 and 86.

The plaintiff's case is that he was entitled as of right to get the rain water which was flowing through Survey No. 91 on to his land by means of existing channels, and that the defendants were not entitled to obstruct the flow of the water through those channels.

The trial Court decided in favour of the plaintiff, but unfortunately owing to an incorrect map being used, it found that the plaintiff was entitled to succeed, not only because he had acquired a prescriptive right to receive this water, but because he had the ordinary right of a riparian owner with regard to the main channel, which carried away the rain water towards a tank.

On a reference to the Commissioner's map, Exhibit 37, it will be perfectly clear that the trial Court was in error in thinking that the plaintiff was a riparian owner because the main channel flowed entirely within Survey No. 91, and the water which flowed on to the plaintiff's land flowed through channels taking off from the main channel at right angles.

The appellate Judge was, therefore, correct in pointing out that the plaintiff was not a riparian owner in regard to the main channel. He omitted to notice that what the trial Court had awarded to the plaintiff was a direction against the defendants that they should re-open the mouths of the cross channels taking off from the main channel, so that the water therefrom could flow on to the plaintiff's land. Accordingly finding that the plaintiff was not a riparian owner, he dismissed the suit.

Now the defendants have relied upon Section 17 (*c*) of the Indian Easements Act which provides that a right to surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise, cannot be acquired by prescription, and cannot be an easement under Section 15 to b

acquired by prescription.

It appears to me that we must consider this case according to the natural conditions and situation of the Survey Numbers in question. From the map the trend of the land is towards the plaintiff's field. Therefore, the rain-water, which falls on the upper land, will gradually find its way to the lower land and there can be little doubt that the water which passed through Survey No. 91, not only includes water which actually falls on Survey No 91, but also water coming on to Survey No. 91 from the higher land, and the object of the owner of Survey No. 91 was to get rid of this water, as paddy was not grown on Survey No. 91, by passing the water through a well-defined channel into the tank in Survey No. 93. There is no evidence to show when the off shoots were made at right angles for some of the water to flow on to Survey No. 86.

But it seems to me, considering the position of these lands and the conditions of agriculture in this part of the country, it would be very inequitable to hold, if the plaintiff had been enjoying the water by means of these channels for a certain number of years, that he could not acquire a prescriptive right to receive water through the channels unobstructed, which would entitle him to come to the Court to ask for relief, in case obstruction was caused by the owner of Survey No. 91.

Considerable confusion has arisen from considering the case from the point of view that the defendants were the owners of a dominant tenement having a right to discharge their water on to the plaintiff's land as owner of the servient tenement. But in the case of agricultural lands the right may very well be just the opposite way.

Although it is quite possible that the owner of one piece of land might acquire the right to drain his water on to the land of another, it would be more natural in hilly districts, such as the one in which the suit lands are situate, for the owner of the lower land to acquire a right to receive water which either falls on or flows into the higher land. It is only in such a way that cultivation in such districts can proceed; and no authority has been pointed out to us which would prevent the owner of the land on the lower level from acquiring such a right against the owner of the land on a higher level.

Such being the facts in the case, it seems to me that the plaintiff has established the fact that he had been accustomed to receive water on to his land by means of well defined channels from the defendants' land. No particular period has been mentioned, but the question would be a question of fact as to how many years the plaintiff had enjoyed this right. Evidently the trial Court came to the conclusion that the right had been enjoyed for such a period that the plaintiff was entitled to ask the Court to grant an injunction against the defendants.

Although the length of the period of the user does not seem to have been considered, it seems to have been admitted, or at any rate taken as granted, that the period of the user was sufficiently long to entitle the plaintiff to an injunction. Once it had been decided that his user was sufficiently long, he was entitled to an injunction. But that question unfortunately has not been considered by the lower appellate Court, and the appellants in that Court were entitled to a finding on that question of fact.

The case proceeded on the footing that the plaintiff had been getting this water for a very large number of years, and the argument was that, however long they might be getting it, they would never acquire the right to have it.

The order dismissing the plaintiff's suit must be set aside and the case must go back to the lower appellate Court to decide whether the plaintiff has been getting the water flowing from the Survey No. 91 for such a time as would entitle him to an order for an injunction against the defendants restraining them from preventing the water from flowing on to his Survey Numbers.

It is rather doubtful whether there was sufficient evidence in the trial Court on the question how long the plaintiff has been getting the water, and, therefore, it would be open to the lower appellate Court to call for evidence if it is not able on the record to come to a conclusion on this question. The appellant will be entitled to his costs of the appeal.

The lower appellate Court

will have to decide the question of damages, having allowed the appeal on a wrong ground.

Shah J.—I agree.

Appeal allowed and case remanded.

A.I.R. 1922 Bombay 380 (1)

MACLEOD, C. J. AND SHAH, J.

Baban Hemraj—Plaintiff-Appellant

v.

City Municipality, Poona—Defendant-Respondent.

S. A. No. 689 of 1920, decided on 15th June 1921 from a decision of Asst. J., Poona in A. No. 156 of 1919.

Bombay District Municipal Act (1901), Ss 167 and 40—Non-performance of Contract—Deduction from deposit—Suit for recovery of, will be governed by S. 167.

A suit by plaintiff to recover the deduction, for non-performance of contract, made under S. 40 from the deposit made by plaintiff will come within the provision of S. 167.

Manohar for *K. V. Joshi*—for Appellant.

H. G. Kulkarni—for Respondent.

Judgment:—Disputes between the plaintiff and the defendant Municipality arose under a contract between the parties. The Municipality had entered into that contract under the powers granted to it under section 40 of the Bombay District Municipal Act. The Municipality claimed, according to the terms of that contract, to deduct a certain amount from the plaintiff's deposit for non-performance of his contract.

As the Municipality obtained their powers to enter into this contract from the Act, it follows that their powers to enforce the contract, according to the construction they put upon it, must also be in pursuance of the Act. Therefore, any suit which the plaintiff might wish to bring under the contract would come within the provision of section 167 of the Bombay District Municipal Act.

I think the decision of the lower Appellate Court was right and the appeal must be dismissed with costs.

Appeal dismissed.

A.I.R. 1922 Bombay 380 (2)

MACLEOD, C J. AND SHAH, J.

Ellis Enas Pavloo Gharry—Defendant-Appellant

v.

Kitter Philip Gowrya—Plaintiff-Respondent.

F. A. No. 292 of 1920 decided on 7th July 1921 from a decisionof 1st Class Sub. J., Thana in Darkhast No. 65 of 1919.

(a) *Civil P.C O. 21, r. 2—Adjustment not certified cannot be pleaded in execution.*

The words "Where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted", do not confine the provisions of the rule to money decrees the provisions of Order XXI, rule 2 would be entirely defeated, if an uncertified adjustment of a decree is permitted to be discussed in execution proceedings.

[P. 381, Col. 1, P. 380, C. 2]

(b) *Civil P. C. S. 47—Decree for partition—Properties sold away subsequently—Executing Court should decide as to distribution of sale proceeds.*

If the plaint properties or any of them have been sold so that the partition proceedings can no longer go on, then the Court in charge of execution proceedings will have to decide what is the proper course to follow, whether to direct that the parties entitled to partition should get the sale proceeds brought into Court and divide them which would of course be the simplest way of settling the matter or to relegate the parties to separate suits. If the plaintiff alleges that some property has been fraudulently sold by other sharers, the question cannot be dealt with in execution proceedings but in a separate suit.

[P. 381, Col. 1 & 2]

G. S. Mulgaonkar—for Appellant.

N. V. Gokhale—for Respondent No. 1.

Macleod, C. J.—This is an application for execution of a decree, which directed that the suit property should be partitioned amongst the sharers. The defendants alleged that the plaintiff had compromised on the 22nd September 1919, and in pursuance of the compromise they had paid plaintiff Rs. 4,600, while Rs. 400 were yet to be paid in full satisfaction of the plaintiff's claim.

It is admitted that the compromise was not recorded, therefore the plaintiff says that the Court executing the decree, in the absence of any certificate, cannot recognise the adjustment. The Subordinate Judge decided in favour of the plaintiff and directed that the papers should be sent to the Commissioner and the Collector for the partition of the property.

It has been argued that Order XXI, rule 2, only applies to decrees for money. The words are "where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted." These words do not seem to me to confine the provisions of the rule to money decrees.

Clearly any decree is provided for. A decree may provide for the payment of money or for any kind of relief other than the payment of money. But if either money is paid or the decree is otherwise adjusted, then the payment or adjustment must be certified. That is the duty of the person in whose favour the payment is made or the adjustment is arrived at.

If that person does not perform his duty, then the opponent may inform the Court of such payment, or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified, and the period of limitation for that application is thirty days under Article 174 of the Indian Limitation Act. But as was decided in *Pandurang* v. *Jagya* (1) there is no limitation for the decree-holder, who can certify a payment or adjustment up to the time that he applies for execution.

But the principle of the rule is that the Court executing the decree shall not be troubled with any dispute between parties with regard to any payment or adjustment, unless the same has been duly recorded and certified. Otherwise in execution proceedings there would be endless disputes as to how far execution should proceed. In this case it is alleged that the plaintiff has received a certain sum of money in satisfaction of the share which she would otherwise get in partition. She denies having received the money. Her allegation seems to be that the other sharers have sold some of the property, and did not allow her a share in it.

Whatever the real truth may be, those questions cannot be dealt with by the Court executing the decree. If there is a case of fraud, then the party defrauded will have his right of action. As far as I can see the provisions of Order XXI, rule 2, would be entirely defeated if we once permitted an uncertified adjustment of a decree to be discussed in execution proceedings. In my opinion the decision of the lower Court was right and the appeal must be dismissed with costs.

If the plaint properties or any of them have been sold so that the partition proceeding can no longer go on, then the Court in charge of the execution proceedings will have to decide what is the proper course to follow, whether to direct that the parties entitled to partition should get the sale proceeds brought into Court and divide them, which would, of course, be the simplest way of settling the matter, or to relegate the parties to separate suits. However we are not concerned with this question at present.

All that we are concerned with is that the Court executing the decree must proceed with the execution.

Shah, J.—I agree

Appeal dismissed.

(1) A. I. R. 1921 Bom. 411=45 Bom. 91=22 Bom. L. R. 1120.

A. I. R. 1922 Bombay 381

MACLEOD, C. J. AND KANGA, J.

Dinshaji Edalji Karkaria—Applicant

v.

Jehangir Cowasji Mistri—Opposite Party.

Cr. Application Rev. No. 61 of 1922 decided on 23rd March 1922 from conviction and sentence passed by Addl. Presy. Magistrate, Bombay.

Penal Code, S. 499—Defamatory statement by complainant, when examined by Magistrate is not previliged.

A witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding. But the protection which may be given upon principles of public policy to a witness cannot be given to a complainant who when asked by the Magistrate to state his grievance deliberately makes a defamatory statement without the slightest justification. 17 Bom. 573 Ref.

[P. 382, C. 1, 2.]

Ratanlal Ranchhoddas—for Applicant.

Macleod, C. J.—The present applicant has been convicted by the Additional Presidency Magistrate under S. 500 of the Indian Penal Code and directed to pay a fine of Rs. 50. He had filed a complaint in the Court of the Presidency Magistrate at Girgaon against the opponent Jehangir, his wife Hirabai, his servant Jiva Rupa, and his friend Jamshetji for the offence of insult and assault. Jiva Rupa was convicted on his own plea of guilty, while the other persons were discharged.

In the course of the hearing, the Magistrate asked the complainant to go into the witness box and state his grievance, and also asked the opponent to do likewise in order that he might see whether a settlement of the case could

be arrived at. The opponent made a statement first. Then when the complainant was making his statement on invitation by the Magistrate, in answer to a question from the Bench, he said "that Jamshetji was kept by Hirabai", the innuendo being that there were immoral relations between Jamshetji and Hirabai.

Accordingly the opponent, after the proceedings were finished, filed a complaint against the original complainant for defamation. When the case came on before the Magistrate, the accused's pleader said that he was going to prove that the words complained of were true in substance and in fact. He was unable to prove that.

Then the line of defence was altered, and the accused tried to make out that he had never used the words. But the Magistrate found on the evidence that the accused had made a defamatory statement; and the only question was whether he was protected by exception 9 to S. 499 of the Indian Penal Code. That exception can only afford protection when the defamatory statement has been made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

It is clear, therefore, that the accused cannot possibly bring himself within that exception, because it cannot be said that the statement he made was made in good faith for the protection of himself or of any other person or for the public good.

Then it is suggested that we should disregard the 9th exception to S. 499 of the Indian Penal Code and consider whether the occasion on which the statement was made was not absolutely privileged. No doubt it has been held by this Court in *Queen-Empress* v. *Babuji* (1) and *Queen-Empress* v. *Balkrishna Vithal* (2) that a witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding although in the latter case Telang J. was of a contrary opinion but was constrained to follow the decision in the former case.

I do not, however, think that the protection which may be given upon principles of public policy to a witness can be given to a complainant who when asked by the Magistrate to state his grievance deliberately makes a defamatory statement without the slightest justification.

In my opinion the provisions of the Indian Penal Code are strictly applicable to this case so that we cannot say that under the law prevailing the occasion was absolutely privileged, or that the accused was at liberty to make any defamatory statement he chose with regard to the opponents who were before the Court. The conviction, therefore, was right and there is no reason to interfere in revision.

The application is, therefore, rejected.

Application rejected.

(1) (1892) 17 Bom. 127.
(2) (1893) 17 Bom. 573.

A. I. R. 1922 Bombay 382.

MACLEOD C. J. AND COYAJEE, J.

Narayan Laxman Chandavarkar—Plaintiff-Appellant

v.

Gopalrao Trimbak Chandavarkara and others—Defendants-Respondents.

S. A. No. 374 of 1921 decided on 26th January, 1922, from the decision of D. J., Nasik, in A. No. 198 of 1920.

Contract Act, Ss. 23, 24—Agreement to give in adoption—Annuity as consideration—Agreement is invalid.

The promise to pay an annuity as consideration for the agreement to give a boy in adoption invalidates the agreement.

G. S. Rao—for Appellant.

Nadkarni and *P. B. Shingne*—for Respondents

Judgment:—Both the Courts have found in this case that the promise to pay the annuity was the consideration for the agreement to give the boy in adoption. That would be sufficient to invalidate the agreement; and we need not consider the question whether the payment of the annuity, if there had been good consideration for it, could be enforced against the heirs of Ganpatrao, although we may point out that the two decisions in *Balkrishna* v. *Janardana* (1) and *Babubhai* v. *Beharilal* (2) appear to be in conflict and may require to be considered hereafter.

The appeal, therefore, will be dismissed with costs.

Appeal dismissed.

(1) (1904) 6 Bom. L. R. 642.
(2) (1905) 7 Bom. L. R. 686.

A.I.R. 1922 Bombay 383

SHAH, AG. C. J. AND CRUMP, J.

Shankar Bharati—Plaintiff-Applicant.

v.

Narasinha Bharati and another—Defts. Opponents.

Civil Appln. No. 861 of 1921 decided on 10th July 1922.

Civil P. C., S. 109—Final order—Order setting aside—Decree on compromise and directing Lower Court to try suit on merits is not a final order.

The trial Court in this case passed a decree upon a certain compromise which was arrived at between the plaintiff and defendant No. 2. On appeal by defendant No. 1 the decree was set aside by High Court and the lower Court was directed to proceed with the suit in the ordinary course, as if there had been no compromise. Plaintiff asked for a certificate for leave to appeal to His Majesty in Council from the order.

Held: the order is not final order within the meaning of S. 109 but only an interlocutory order The word 'final' is used in its ordinary sense and therefore means an order which puts an end to the litigation between the parties or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. [P. 383, C. 2]

S. R. Bakhale and *K. H. Kelkar*—for Applicant.

A. G. Desai—for Opponent No. 1.

B. V. Desai—for Opponent No. 2.

Shah, Ag. C. J—This is an application for leave to appeal to His Majesty in Council. It is urged that as this Court set aside the decree of the lower Court and sent back the case to the trial Court for disposal according to law, it is a final order within the meaning of S. 109 (*a*), Civil Procedure Code, and that as the subject-matter of the suit and of the appeal is over Rs. 10,000 in value, the applicant is entitled as of right to a certificate under S. 110.

The trial Court in this case passed a decree upon a certain compromise which was arrived at between the plaintiff and defendant No. 2. There was an appeal from the order directing a decree to be passed in terms of the compromise under Order XLIII, rule 1, clause (*m*), Civil Procedure Code, to this Court. This Court in the first instance sent down certain issues to the trial Court for findings; and after the findings were returned to this Court, the order under appeal was set aside and the lower Court was directed to proceed with the suit in the ordinary course as if there had been no compromise.

The applicant now asks for a certificate for leave to appeal to His Majesty in Council from the order made by this Court on the appeal from order. It would appear from S. 104, sub-section (2), that no appeal shall lie from any order passed in appeal under that section. So it is urged that the order passed by this Court is a final order within the meaning of S. 109.

I am, however, unable to accept this contention. Having regard to the nature of the order it seems to me that it is an interlocutory order. It decides no point arising in the suit, and certainly no cardinal point in the suit. It only disposes of a point which arose during the pendency of the suit, extraneous to the suit. It does not finally dispose of any rights of the parties.

The suit is still to be heard on the merits. After giving my best consideration to the question as to whether such an order could be treated as a final order within the meaning of S. 109, I have come to the conclusion that it is not a final order within the meaning of that section. The applicant is not, therefore, entitled as of right to a certificate. It is conceded that if he is not entitled as of right, there is no other valid ground for certifying the case as a fit one for leave to appeal to His Majesty in Council.

I, therefore, discharge the rule with costs payable to defendant No. 1 only.

Crump, J.—I agree. It is not always easy to say what is or is not a final order for the purposes of S. 109, Civil Procedure Code. But in the present case I feel no doubt that this is not a final order. All that this order does is to decide that the manner in which the lower Court disposed of this suit was incorrect, and that the suit must be disposed of on the merits, and not upon a certain compromise. I cannot see myself that this is in any sense a final order.

I take the word 'final' to be used in its ordinary sense and, therefore, to mean an order which puts an end to the litigation between the parties, or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. There is nothing of the kind about this order which is for all practical purposes interlocutory only, and, therefore, I agree that no appeal will lie.

Rule discharged.

A.I.R. 1922 Bombay 384.

SHAH, AG. C. J. AND CRUMP, J.

In re Kariyappa Ningappa.

Cr. Application for Rev. No. 65 of 1922, decided on 15th June 1922 against an order of Sub-Div. Magistrate, Dharwar.

(a) *Criminal P. C., Ss. 133, 137—Conditional order—Evidence taken by one and final decision by another Magistrate—Procedure is irregular.*

A conditional order was made under S. 133, Cr. P. C. by a Magistrate whereby the petitioner was required to appear before the said Magistrate to show cause against the order. After that the parties appeared before him and the papers were forwarded to another Magistrate for inquiry and report. After evidence having been recorded and a report made by that Magistrate, the first Magistrate made his final order. *Held*; that the procedure followed in this case is irregular and the order should be set aside on that ground. After the conditional order was made in the terms already stated, it was incumbent upon the Magistrate under S 137 to take evidence as in a summons case, if the final order was to be made by him. [P 384, C 2.]

(b) *Jurisdiction—Consent—Cannot give.*

No consent by the parties ca possibly cure an illegality. [P. 385, C. 1]

H. B. Gumaste—for Applicant.

G. S. Mulgaonkar—for Opponent.

S. S. Patkar—Government Pleader for the Crown,

Shah, Ag. C. J.—In this case a conditional order was made under S. 133, Criminal Procedure Code by the Sub-Divisional Magistrate, Third Division, Dharwar on the 5th December 1921, whereby the present petitioner, Kariappa Bin Ningappa Savadi, was required either to remove the wall by the 21st December 1921 or to appear before the said Magistrate to show cause against the order.

After that the parties appeared before him and it appears from the proceedings that the papers were forwarded to the Second Class Magistrate, Navalgund, for inquiry and report, because the parties expressed their inability to attend the Court of the said Magistrate. Afterwards the Second Class Magistrate recorded evidence and made a report. On that the Sub-Divisional Magistrate made his final order. We think that the procedure followed in this case is irregular and the order should be set aside on that ground.

It was open to the Magistrate to direct the party by the conditional order to appear before himself or before some other Magistrate of the First or Second Class at a certain time and a place to be fixed by the Court. But he ordered that the party should appear before himself, and having done that, it seems to me that, under S. 137, Criminal Procedure Code, it was his duty to take the evidence in the matter as in a summons case.

The Code does not provide that evidence can be recorded in the manner in which it has been recorded in this case even with the consent of the parties. The result in the present case has been that the evidence has been recorded by one Magistrate and the decision thereon has been given by another Magistrate. That seems to me to be opposed to the scheme and provisions of the Criminal Procedure Code bearing on the point. After the conditional order was made in the terms already stated, it was incumbent upon the Magistrate under S. 137 to take evidence as in a summons case, if the final order was to be made by him.

It has been urged by the Government Pleader that this may be treated as an irregularity and as the parties consented to the procedure it may be condoned. I am, however, unable to accept that contention I think that it is a matter of substance that the evidence should be recorded by the Magistrate who has to decide the case, and generally speaking it is difficult to say that the omission to do so does not occasion a failure of justice.

I am of opinion that on this ground the order made by the Sub-Divisional Magistrate on the 17th February 1922 should be set aside. This will be of course without prejudice to any fresh proceedings that may be taken, with reference to the alleged obstruction; in a proper way under this Chapter against the present petitioner.

Crump, J.—I agree. I do not think that it is possible to uphold this order by invoking S. 537 of the Criminal Procedure Code. For, as I apprehend the matter, there has been a complete disregard of the imperative provisions of S. 137. The conditional order under S. 133 was made by the Sub-Divisional Magistrate on the 5th December 1921, and on the 17th February 1922, he made that order absolute.

Now, if we refer to S. 137 it is manifest that the materials on which the conditional order can be made absolute by the Magistrate, who makes that order are

described in the language of the section as evidence taken as in a summons case. That imports the necessity of the Magistrate taking the evidence before himself and he cannot, even with the consent of the parties, refer the matter for inquiry and report to another Magistrate. I am not speaking now of those cases where parties are directed to appear before another Magistrate of the First or Second Class as provided for in the last paragraph of S. 133 (1), for that is not the case in the present matter. The order having thus been made absolute on materials which are not provided for by the section and in a manner contrary to the express provision of the section, no consent of the parties can possibly cure the illegality.

I, therefore, agree that the proceedings must be set aside. *Order set aside.*

A.I.R 1922 Bombay 385 (1)

SHAH, AG. C. J. AND CRUMP, J.

Ambai Balwantrao Mane—Plaintiff-Applicant.

v.

Hanmantrao Bajirao Deshmukh—Defendant—Opp. Party.

Civ. Extra. Application No. 225 of 1921, decided on 10th July 1922 against an order of 1st Class Sub-J., Sholapur in S. No. 569 of 1920.

Civil P. C. S. 151 and O. 33—Order directing pauper to pay costs of amendment—Is not a proper order.

Applicant who was allowed to sue as pauper applied for amendment of plaint. The amendment was allowed but the applicant was directed to pay costs (amounting to Rs. 500) of defendant in cash within a week and on his failure to do so the suit was dismissed.

Held: the order directing the applicant who was a pauper to pay the costs in cash and the order dismissing the suit for failure to pay the costs was not a proper order. [P. 385, C. 2.]

V. D. Limaye—for Applicant.

S. S. Patkar, Government Pleader—for Opp. Party.

Shah, Ag. C. J.—The petitioner before us was allowed to sue as a pauper in the trial Court, the order permitting him to sue as a pauper having been made on June 12, 1920. Subsequently an application was made by him for the amendment of the plaint. The learned Subordinate Judge made an order allowing the amendment and directing the costs of the defendant to be paid by the plaintiff in cash within a week. The costs, we are informed, would amount to about Rs. 500. The plaintiff who was found to be a pauper was unable to pay that sum. The result was that on July 9, 1921, the learned Subordinate Judge dismissed the suit "under the inherent powers of the Court." It is urged on behalf of the applicant that the order directing him to pay the costs in cash after he was found to be a pauper was wholly improper.

The contention of the applicant appears to us to be unanswerable. The order directing him to pay the costs in cash should never have been made having regard to the finding that he was a pauper; and it follows that the subsequent order dismissing the suit for non-compliance with that order also should not have been made. We do not mean to suggest that the amendment prayed for was not properly allowed. We make the rule absolute, set aside the decree of the lower Court dismissing the suit, and send back the case to that Court for disposal according to law.

The applicant to have the costs of this application. *Rule made absolute.*

A.I.R. 1922 Bombay 385 (2)

MACLEOD, C. J. AND COYAJEE, J.

Nasarvanji Cawasji Arjani—Defendant-Appellant

v.

Shahajadi Begam and others—Plaintiff-Opp. Party.

Civil Extra. Application No. 312 of 1921, decided on 6th February 1922 against the order of D. J., Satara in M. A. No. 7 of 1921.

Civil P. C O. 39, Rr. 1, 2—Decree for possession by tenant against sub-tenant—Landlord cannot sue to prevent execution by injunction.

The plaintiffs, as owners of the property, filed a suit against the defendant claiming that they were entitled to possession on the ground that the lease had expired and that the decree which the defendant had obtained against his sub-tenants for possession was not binding upon them and for an injunction against the defendant not to take possession; and after the suit was filed asked for, and were granted a temporary injunction restraining the defendant from executing his decree against the sub tenant.

Held; the Court had no jurisdiction to restrain the defendant from seeking to get the benefit of the decree he had obtained and which had nothing whatever to do with the plaintiff's claim. What the plaintiffs ought to have asked for was the appointment of a Receiver so that the Court might take charge of the property through its Receiver pending the settlement of the dispute between the plaintiffs and the defendant. [P. 386, C. 1.]

G. N. Thakore—for Applicant.

A. C. Desai—for Opp. Party.

Macleod, C. J.—The present plaintiffs were owners of bungalow at Panchgani which had been let to the defendant on a lease, which the plaintiffs say expired on the 30th June 1920. Meanwhile the defendant had sub-let the premises, or part of them, and as he could not get possession from his sub-tenants a suit had to be filed in which there was a decree in the defendant's favour. The plaintiffs, as owners of the property, filed a suit against the defendant claiming that they were entitled to possession, and that the decree which the defendant had obtained against his sub-tenants was not binding upon them, and for an injunction against the defendant not to take possession.

After the suit was filed, an application was made by the plaintiff for a temporary injunction restraining the defendant from executing his decree against the sub-tenants. The trial Court granted the injunction, and an appeal against that order was dismissed by the District Judge.

In revision it is urged for the defendant that the Court had no jurisdiction, to grant the temporary injunction asked for. Order XXXIX, rules 1 and 2, prescribe in what cases the Court can grant temporary injunction, and it is quite clear that the plaintiffs' suit is not a suit of the nature prescribed in either rule 1 or rule 2. The primary object of the plaintiffs' suit is to get possession of the property which they claimed as belonging to them, on the ground that the term of the defendant's lease had expired, and accordingly possession should be given to the owner.

That is an entirely different question from that which had already been decided between the defendant and the sub-tenants. The Court has no jurisdiction to restrain the defendant from seeking to get the benefit of the decree he has obtained, which has nothing whatever to do with the plaintiff's claim. What the plaintiffs ought to have asked for was the appointment of a Receiver, so that the Court might take charge of the property through its Receiver pending the settlement of the dispute between the plaintiffs and the defendant.

The rule will be made absolute, and the order staying execution and restraining the applicant from executing his decree set aside, with costs throughout.

Rule made Absolute.

A.I.R. 1922 Bombay 386

MACLEOD, C. J., AND SHAH, J.

Haji Dawood—Appellant

v.

Municipal Commissioner, City of Bombay—Respondent.

S. C. C. Ref. Municipal A. No M. 46 of 1921 decided on 27th March 1922. Ref. by the Chief Judge of the Presy. S. C. Court.

Bombay Municipal Act (1888), S. 154 (2)—Valuation of property—Deduction for tub baths etc. cannot be made.

In respect of buildings no deduction in their rateable value should be allowed to the owner, for the cost of bath tubs and lavatories and electric lights and fans. Without these conveniences the premises would not be let. Electric fittings in a residence do not come within the term machinery. [P. 387, C. 1.]

Inverarity and *Taljarkhan*—for Appellant.

Thomas Strangman and *Campbell*—for Respondent.

Macleod, C. J.—This is a reference by the Chief Judge, Small Cause Court, in an appeal before him against an assessment under the City of Bombay Municipal Act. The appellant is the owner of a building at the junction of Warden Road and Nepean See Road which is let out in flats under registered leases. The building is fitted up with electric fittings and fans, bath tubs and lavatories; and the question referred to us is :

"Whether in respect of buildings, situated as in this case, deduction in their rateable value should be allowed to the owner, for the reasonable cost of bath tubs and lavatories and electric lights and fans?"

The learned Judge has also added after the word 'lavatories' the words "with the necessary gas plant." But we are not concerned with gas plant in this case, and those words should be deleted from the Reference.

Now there can be no doubt that the baths and the lavatories are annexed to the freehold and all electric fittings are also annexed to the freehold, except perhaps such fittings as are attached to plugs in the wall. I should say myself that there can be no doubt as regards the baths and lavatories, that the landlord is not entitled to deduction for the cost of these. Without these conveniences the premises would not be let,

unless perhaps a tenant were found to take the premises on a long lease on favourable terms on the understanding that he should put up such fittings himself.

But ordinarily speaking baths and lavatories must necessarily be put in before tenants can be expected to take the premises. Again, with regard to electric fittings and fans it may be that the landlord may not attach these conveniences to the premises, and may get tenants to take the premises on the understanding that they should put the fittings themselves. But it is obvious that if the landlord puts in those fittings it will be easier to get tenants.

The only reason on which the appellant's claim for deduction can be based is that these fittings should be treated as machinery, which under S 154 (2) of the City of Bombay Municipal Act shall not be included for rateable value of the building. But we have not been referred to any authority under which it is said that electric fittings in a residence come within the term "machinery". It seems to me that when electric fittings are installed by a landlord they become part of the premises and so are necessary for the user of the premises by the tenant.

Therefore, no deduction can be allowed for the cost of such installation.

We, therefore, answer the question in the negative. Costs taxed as on the Original Side to be costs in the case.

Shah, J.—I agree.

Answer accordingly.

A. I. R. 1922 Bombay 387.

MACLEOD, C. J. AND COYAJEE, J.

Bai Judi—Appellant.

v.

Purshottam Narottam Dave—Respondent.

L. P. Appeal No. 9 of 1922, decided on 6th March 1922 against the decision of Shah, J. in S. A. No. 522 of 1920.

(a) *Immoveable Property—Mortgage right is not.*

A usufructuary mortgage-right is not immoveable property.

[P. 389, C. 2.]

(b) *Hindu Law—Widow—Mortgage right—Sold in execution of decree against widow—Sale is binding on Reversioner.*

Where a widow sub-mortgaged her mortgagee rights under a mortgage taken by her husband and in the sub-mortgagee's suit the mortgage right was sold in execution and the mortgagor then redeemed the property in possession of the purchaser at the auction sale.

Held: a usufructuary mortgage is not immoveable property so that, if the mortgage were redeemed during the widow's life-time the widow could spend the money as she would be entitled to do. The reversioner therefore cannot claim against the party redeeming to be again put in possession of the property until redeemed a second time. The mere fact that the widow was in possession as mortgagee would not cause those mortgage rights to be treated in law as immoveable property, as all that the widow was entitled to was a right to retain possession of the property as security for the debt until she was redeemed.

[P. 389, C. 2.]

D. W. Pilgaonkar—for Appellant.

Shah, J.—In order to appreciate the points raised in this appeal on behalf of the plaintiff-appellant, it is necessary to state the facts.

The field in question originally belonged to one Mathur, the father of the present defendants Nos. 4 and 5 and the brother of defendant No. 6. It was mortgaged by Mathur to one Punja. Punja died leaving a widow named Bai Manek and a daughter who is the present plaintiff. In 1892 Bai Manek and the husband of the present plaintiff, that is, her son-in-law, created a san mortgage in favour of one Pitamber, the father of the present defendants Nos. 1 to 3 in respect of the field in question and other properties. On this san mortgage Pitamber filed Suit No. 441 of 1896 to recover his money against the widow and others.

It was found in that suit that the debt was not incurred for any legal necessity by Bai Manek and a decree was passed in favour of the plaintiff for the amount claimed with the following direction:—"On the defendants' failing to do so the plaintiff do sell the right, title and interest of Bai Manek, the first defendant, in the plaint hypothecated house and the mortgage right of Rs. 460 Babashahi created by Mathur Mangal the 6th defendant over his portion in favour of Punja Garbad".

Ultimately this mortgage right by Mathur in favour of Punja was put to sale and on the 28th February 1900 Pitamber, the decree-holder, bought that interest. On the 23rd March 1914, the sons of Mathur sold the equity of redemption to defendant

No. 7, and on the following day, i. e., 24th March 1914, defendant No. 7 redeemed the mortgage created in favour of Punja by paying off the amount of the mortgage to Pitamber. Bai Manek died in 1917. The present suit is filed by Punja's daughter to recover possession of the property under the mortgage in favour of Punja as the next reversioner after the widow's death on the footing that the mortgage was still alive.

The trial Court allowed the plaintiff's claim holding that the transaction between defendant No. 7 and Pitamber on the 24th March 1914 was really not a redemption of the mortgage in favour of Punja but a sort of collusive transaction.

In appeal the learned Joint Judge reversed the decree and dismissed the plaintiff's suit, holding on issue No. 3, in view of the documents produced by defendant No. 7 in appeal, that the sale of the equity of redemption in favour of defendant No. 7, and the redemption by him of the mortgage right in favour of Punja which was then vested in Pitamber were real transactions, and not merely fraudulent and nominal.

In the appeal before me it is urged on behalf of the plaintiff that the redemption of the mortgage in favour of Punja which was effected by defendant No. 7 with Pitamber was not a real transaction. It seems to me however that it is a question of fact and the finding of the lower appellate Court on this point must be accepted.

It is not suggested before me that when the documents were produced by defendant No. 7 in appeal, any application on behalf of the present appellant was made for an opportunity for further evidence on the point. Beyond a vague suggestion that if the matter were remanded, the plaintiff might be in a position to adduce further evidence, nothing definite is stated before me with a view to show that the opportunity which was not sought in the lower appellate Court should now be allowed to the plaintiff.

It is further urged in support of the appeal on the footing that this finding is to be accepted that as Bai Manek had only a life interest in the mortgage rights in favour of Punja, and that as the decree in favour of Pitamber which limited his rights to bring to sale the right, title and interest of the widow only, the redemption with Pitamber could be operative only so far as Bai Manek's interest was concerned and would have no effect after her death. It is rather unfortunate that the sale certificate in favour of Pitamber has not been produced.

But it is clear having regard to the terms of the decree that as a result of the purchase on the 28th February 1900, he got all the interest in the mortgage right of Punja which his widow had at that date; and when defendant No. 7 redeemed this mortgage in 1914. It seems to me that it was as effective as it would have been, had there been no transaction at all by Bai Manek with Pitamber and had the redemption been effected with Bai Manek. Bai Manek during her life time represented the estate of her husband and the person interested in the equity of redemption would have been entitled to effect the redemption of the mortgage with her and that redemption would be binding upon the reversioner on her death. Pitamber became entitled to all the rights which Bai Manek had during her life-time by his purchase in 1900.

It seems to me, therefore, that defendant No. 7 by paying off the mortgage amount to Pitamber redeemed the mortgage, and the mortgage was extinguished. It is clear, therefore, that the present plaintiff cannot claim any right to mortgaged property as that mortgage is no longer in existence. It may be that she has some claim to the amount which Pitamber received from defendant No. 7 on this mortgage. No such claim is made in this suit. It is not necessary for me to express any opinion whether at the date of the suit any such claim could have been made or whether it can be made hereafter at any time.

The result is that the decree of lower appellate Court is affirmed and the appeal dismissed with costs.

Macleod, C. J.—This is a Letters Patent appeal from the decision of Mr. Justice Shah affirming the decree of the lower appellate Court which

dismissed the plaintiff's suit. The facts are set out in the judgment from which it appears that one Punja was the original mortgagee of the suit property. When he died his widow Bai Manek became entitled to the rights of Punja as mortgagee, and Bai Manek created a sub-mortgage in favour of one Pitamber in respect of the suit property and other property, that is to say, she pledged her mortgage rights which had come to her from her husband.

Pitamber filed a suit to recover his debt from the widow and others and obtained a decree for the amount claimed with the direction that "on the defendants' failing to pay, the plaintiff do sell the right, title and interest of Bai Manek, the 1st defendant, in the plaint-hypothecated house and the mortgage right of Rs. 460 Babashahi created by Mathur Mangal the 6th defendant over his portion in favour of Punja Garbad."

Ultimately this mortgage right by Mathur in favour of Punja was put up for sale and purchased by Pitamber. Then the sons of Mathur sold the equity of redemption to defendant No. 7, and defendant No. 7 redeemed the mortgage created in favour of Punja by paying off the amount of the mortgage to Pitamber.

The result of all these proceedings would be that defendant No. 7 became the absolute owner of the property. But when Manek died in 1917, her daughter sued to recover possession of the property as the next reversioner after Manek's death. That suit could only be based on the suggestion that the mortgage rights which had come to Bai Manek from her husband were still alive and that, therefore, the reversioner succeeded to those mortgage rights, and was entitled to get possession of the property, subject to being redeemed by the original mortgagor or his successors. This contention of the plaintiff could only succeed if the rights which Bai Manek succeeded to on her husband's death with regard to the suit property could be considered as immoveable property, so that the widow's interest only could be sold, and on her death the reversioner could succeed to the property.

But no authority has been cited for the proposition that a usufructuary mortgage is immoveable property, so that if the mortgage is redeemed during the widow's life-time, and the widow spent the money, as she would be entitled to do, the reversioner could claim against the party redeeming to be again put in possession of the property until redeemed a second time. Clearly the mortgage rights which were vested in Bai Manek represented moveable property, and could be sold in execution of the decree against Bai Manek, and no question of legal necessity would arise. The mere fact that Bai Manek was in possession as mortgagee, would not cause those mortgage rights to be treated in law as immoveable property as all that the widow was entitled to was to retain possession of the property as security for the debt until she was redeemed.

Therefore what was sold in execution of Pitamber's decree was the right to be redeemed, and when as a matter of fact the purchaser of that right has actually paid the mortgage money, the result was that the mortgage came to an end, no right was left to which the reversioner could succeed on the death of the widow. I think, therefore, that the decision of Mr. Justice Shah was right and the appeal should be dismissed.

Coyajee, J.—I agree. In my opinion the conclusion arrived at by Mr. Justice Shah and expressed by him in the following terms is perfectly correct. His Lordship observes:

"It is rather unfortunate that the sale certificate in favour of Pitamber has not been produced. But it is clear, having regard to the terms of the decree, that as a result of the purchase on the 28th February 1900, he got all the interest in the mortgage right of Punja which his widow had at that date and when defendant No. 7 redeemed this mortgage in 1914 it seems to me that it was as effective as it would have been, had there been no transaction at all by Bai Manek with Pitamber and had the redemption been effected with Bai Manek. Bai Manek during her life-time represented the estate of her husband and the person interested in the equity of redemption would have been entitled to effect the redemption of the mortgage with

her and that redemption would be binding upon the reversioner on her death."

Appeal Dismissed.

A.I.R. 1922 Bombay 390

MARTEN, J.

In re Maneckchand Virchand Patni

Insolvency Pet. No. 334 of 1922, decided on 4th July 1922.

Presidency Towns Insolvency Act, Ss. 18, 22—Proceedings pending in two courts—District Court is not subject to superintendence of Commissioner in Insolvency—No transfer of Insolvency Proceedings from District Court can be made under S. 18.

S. 18 applies to a case where the Insolvency Court has power to stay some ordinary civil suit which may be pending at the date of the insolvency against the insolvent. It does not relate to some other insolvency pending in some other Court of another province or in any of the District Courts of the same Presidency. That other insolvency is not a "suit" pending against the insolvent. Nor is it an "other proceeding" pending against the insolvent. Such other proceeding should be *ejusdem generis* or analogous to a suit. The District Court is not subject to the superintendence of the Commissioner in Insolvency but the High Court. Each Court can stay its own proceedings, but cannot interfere with another Court, unless it has superintendence over it. In the matter of *Watson* 31 Cal. 761 ; 39 Bom. 604 Ref. [Page 390, Col. 2.]

Bramhandkar—for Insolvent.

Bhandarkar—for Opposing Creditor.

Marten, J.—This is an application by one Maneckchand Virchand, an insolvent, first, that the further proceedings in the insolvency petition No. 1 of 1922 in the District Court of Nasik be stayed by sending a notice to that Court as provided by S. 18 of the Presidency Towns Insolvency Act III of 1909; secondly, that the Insolvency Petition No. 1 of 1922 pending in the District Court, Nasik, be ordered to be transferred to this Court; thirdly that the present High Court insolvency petition and the Nasik insolvency petition be then consolidated; and, lastly, for such other order as the Court may think fit to make.

The other order that I think fit to make is that this application be dismissed as being entirely misconceived, It is apparently based on S. 18 of the Presidency Towns Insolvency Act which runs:—

"(1) The Court may, at any time after the making of an order of adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court."

That section of course applies to the familiar case where the insolvency Court has power to stay some ordinary civil suit which may be pending at the date of the insolvency against the insolvent. In my opinion it does not relate to some other insolvency pending in some other Court of another province or in any of the District Courts of our own Presidency. Certainly that other insolvency is not a "suit" pending against the insolvent. Nor in my opinion is it an "other proceeding" pending against the insolvent. Such other proceeding should, I think, be *ejusdem generis* or analogous to a suit.

But however that may be, I am of opinion that the District Court is not subject to the superintendence of the Commissioner in insolvency, and that consequently on that ground alone S. 18 is not complied with.

I may also observe that S. 22 of the Presidency Towns Insolvency Act expressly provides for the case where other insolvency proceedings are pending in any other British Court. Then, if the Court thinks that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or may stay all proceedings thereon. Examples of how that jurisdiction is exercised will be found in the cases of *Re Aranvayal Sabhapathy* (1) and *In the matter of William Watson* (2). In other words each Court can stay its own proceedings, but cannot interfere with another Court, unless it has superintendence over it.

Then when one turns to the Provincial Insolvency Act V of 1920, which is the latest Act regulating insolvency matters in our province, it is quite clear that appeals under that Act lie from the District Court to the High Court. In my opinion the High Court there means the High Court on its Appellate Side, and does not mean the Commissioner in Insolvency. So it is the High Court on its Appellate Side, which has superintendence over the District Court.

As far as the ordinary procedure and powers of the Judges on the Ori-

(1) (1897) 21 Bom. 297.

(2) (1904) 31 Cal. 761 = 8 C.W.N. 533;

ginal Side are concerned, the Full Bench case of *Narayan* v. *Jankibai* (3) decides that it is not competent for a single Judge of the High Court, exercising the ordinary original civil jurisdiction of the Court, to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the mofussil, unless authorised so to do by rule.

Mr. Justice Macleod in that case was of opinion that there was jurisdiction *in personam* to restrain the parties from proceeding with such a suit, and the Appellate Court in *Mulchand Raichand* v. *Gill & Co.* (4) was of the same opinion. But however that may be, that point does not arise in the present case. I am not here exercising any jurisdiction *in personam* whatever.

I thus refer to the Original Side jurisdiction, because this morning counsel for the applicant urged that, under S. 5 of the Provincial Insolvency Act 1920, I had the same powers as if I was sitting on the Original Side. But the Full Bench case shows that, even then, I should have no power to stay the Nasik proceedings, and much less to transfer them to the High Court.

At the time of that argument, nobody appeared to oppose, but for various reasons I stood the matter over till after the midday adjournment. Then Mr. Bhandarkar appeared for the opposing creditor, and has argued that I have no jurisdiction to hear the present application at all. I cannot decide the point of jurisdiction without hearing the parties, but having done so, my conclusion is that I have no jurisdiction to grant the present application.

I should mention one other matter. The parties appear to be greatly moved over certain proceedings that have taken place in a Nasik civil suit where certain property has been realised, and certain sums I understand have been set aside by the Subordinate Judge pending the Nasik insolvency proceedings.

It is further said that the interim receivers appointed in the Nasik insolvency proceedings by the Nasik District Judge are entitled to these sums so set aside and that they ought not to be lost to the general body of creditors. As to that the present High Court petition states as follows:—

"The petitioner further learns that the District Judge of Nasik after he received the letter of the Official Assignee has recently passed an order in the said insolvency petition No. 1 of 1922 that the said interim Receivers do vacate their office and hand over possession of all properties of the petitioners to the Official Assignee excepting the sum of Rs. 15,005 lying with the Second Class Subordinate Judge of Yeola. And that the petitioner further learns that the District Judge of Nasik is going to dismiss and dispose of the said insolvency petition No. 1 of 1922 pending in his Court against the insolvents on 25th June 1922. That the petitioner therefore submits that immediate action is urgently required to be taken by this Hon'ble Court."

How far that paragraph is accurate I do not know. But the learned District Judge of Nasik has similar powers of staying insolvency proceedings in his own Court, to those which I have under S. 22 of the Presidency Towns Insolvency Act. And it would appear to be a question here following. I take it, the decisions in *Re Aranvayal Sabhapathy* (1) and *In the matter of William Watson* (2) as to which Court this particular insolvency can be more conveniently prosecuted in. The assets certainly seem to be very large—nearly three lacs—but I have no materials at the present moment before me pointing to a conclusion either the one way or the other.

Nor is there even any application before me by Mr. Bhandarkar's client, asking that I should exercise my powers under S. 22. But if the learned Nasik District Judge, after considering all facts, is of opinion that this matter may be more conveniently disposed of in the High Court, then I dare say he will exercise his powers of staying proceedings.

In saying this, I am in no way attempting to fetter his discretion, and for two very good reasons. First, that it would be very improper for me to do so, and secondly, I have not got the facts before me on which

(3) (1915) 39 Bom. 604 = 30 I. C. 560 = 17 Bom. L. R. 655 (F. B.)

(4) (1919) 44 Bom. 283 = 53 I. C. 518 = 21 Bom. L. R. 963.

I could exercise my own discretion. But I do say that, as at present advised, I think it will be very inconvenient to have two sets of insolvency proceedings going on together.

As regards the sum of Rs. 15,005 and the position of the interim Receivers, personally I do not see any difficulty. The Official Assignee will, I take it, intervene and get whatever he can subject to such orders as may be passed in the Nasik Court. If there are prior persons there in the way of interim Receivers, then presumably their claims will have to be satisfied first.

This is not the first time this sort of point has arisen, as will be seen on looking at the authorities. I think a little common sense will remove this difficulty which the legal gentlemen concerned in the case appear at the present moment to feel.

My order will be that the present application be dismissed. There will be no order as to the costs of Mr. Bhandarkar's client.

Application Dismissed.

A. I. R. 1922 Bombay 392

MARTEN AND FAWCETT, JJ.

Sir Mahomed Yusuf and other—Defendants-Appellants.

v.

Hargovandas Jivan — Plaintiff-Respondent.

O. C. J. A. No. 137 of 1921 in S. No. 4063 of 1921 decided on 16th March 1922 against the decision of C. J. on originating Summons.

(a) *Probate and Administration Act. Ss. 90, 59 and 12—There is no necessity of probate for vesting of title.*

Title vests in executor from the moment of death and probate is not necessary for title to be vested in the executor. 8 Bom. 241 Foll.

(b) *Mahommedan Law—Will—Right of heirs is only to two-thirds after assets are arealised after payments and debts of funeral expenses—Probate and Administration Act, S. 90.*

Where executors have been appointed the right of the heirs is not to an aliquot two-thirds of all the testator's assets at his death. The debts and funeral expenses etc., have first to be paid and then the estate realised, and it is only to two-thirds of such net assets that the heirs are entitled. Consequently until such two-thirds are ascertained the executor is *prima facie* entitled to exercise his wide powers of disposition under S. 90 of the Probate and Administration Act. [P. 395, C. 2.]

T. Strangman.—for Appellant.

B. J. Desai—for Respondent.

Marten, J.—This appeal raises a short but important point on a Vendor and Purchaser Summons, *viz*, whether the executors of a Mahomedan will can validly sell and convey their testator's immoveable property without first taking out probate, or else obtaining the consent of all the heirs.

The testator was a Bombay, as opposed to a Kathiawar, Halai Memon. Consequently the succession to his estate is governed by Mahomedan law: *Mahomed* v. *Katubai* (1) and that law is Sunni Mahomedan law. He made a will on the 5th November 1920 some twenty-four hours before his death. That will is exhibited to the joint affidavit of the three attesting witnesses sworn on the 30th September 1921 which we have admitted in evidence in this Court.

The will after appointing the appellants to be his executors and trustees and guardians of his two infant daughters directed his trustees to pay his debts and funeral and testamentary expenses and a certain sum for funeral and religious ceremonies. The testator further directed his trustees to collect and get in all his estate and thereout pay one-third to charity as therein mentioned, and divide the remaining two-thirds amongst his heirs according to Mahomedan law. The heirs of the testator are his above two daughters and his father.

On the 1st September 1921 certain Falkland Road property belonging to the testator's estate was sold by auction by the appellants to the respondent for Rs. 2,66,000 of which Rs 66,500 was paid as deposit. The conditions of sale set out the position clearly and fairly, apart from the mortgage which I will mention later. They showed that the appellants were selling as executors of the will of a Halai Memon testator, and would convey as such.

They expressly provided that the purchaser should not be entitled to call upon the vendors to apply for probate. They gave a list of the title-deeds other than the mortgage, and proper facilities for inspecting them. And they expressly provided

(1) (1918) 43 Bom. 647=21 Bom. L. R. 85=51 I. C. 513.

that the purchaser should accept the vendor's title as disclosed by the said deeds and documents and should take the property with such title only as the vendors could give.

The purchaser signed the usual auction memorandum of sale and thereby agreed *inter alia* to complete the purchase according to the said conditions, and in all other respects fulfil the said conditions.

On the 17th September, the purchaser delivered some thirteen requisitions, some of which at any rate were clearly barred by the conditions of sale. Requisition I for instance asked questions as to the title prior to the 4th July 1891 which were expressly barred by conditions 12 and 16. Requisitions 4 to 9 objected in effect that the vendors could not sell without the concurrence of the heirs or a grant of probate.

On the 24th September the vendors replied stating that under condition 18, the purchaser was bound to accept the title and was not entitled to make any requisitions, and that accordingly they answered the requisitions without prejudice to their rights. Then followed full answers to the requisitions. Answer 12 stated that there was an outstanding mortgage for one lac which would be reconveyed prior to completion.

On the 26th September 1921, the purchaser took out the present Originating Summons to determine the main points in dispute. It was heard by the learned Chief Justice in Chambers on the 1st October, and decided in favour of the purchaser. Unfortunately we have no note of his judgment, if any. The note taken by the Judge's clerk runs as follows:

"P. C. There is flaw in the title, which can be cured by all the heirs joining in the conveyance."

" Question 1 : Considering the provisions of Mahomedan Law the property has not vested in his executors, and one cannot say whether the property is included in the one-third which the executors can dispose of without consent of heirs. If the heirs don't join, the plaintiff is entitled to his earnest money with interest at six per cent. Each party to pay his own costs."

The formal order as drawn up follows that note, and from that order the present appeal is brought by the vendors. Under the Chancery practice such an appeal could not be presented against the decision of a Judge in Chambers unless either (*a*) he had certified that the case had been fully heard in Chambers, or (*b*) there had been a motion before him in Court to discharge his order made in Chambers.

Unfortunately for the parties that practice does not prevail here and accordingly we are deprived of the great advantage which we would otherwise have had of a reasoned judgment from the Chief Justice on a point which is of importance not only to the present litigants but also to the Mahomedan community at large.

Turning first to the facts we are of opinion that for the purposes of the present appeal the document Ex. A. in the joint affidavit I have referred to, must be taken to be the last will of the testator. Not only is its execution deposed to in the joint affidavit but the purchaser's own plaint is founded on its being the last will; and so are the conditions of sale. Next it is clear that under that will the appellants are his executors.

Turning next to the Probate and Administration Act 1881, S. 2 provides that Chapters II to XII (inclusive) of that Act are to apply in the case of every Mahomedan such as the present testator. Chapter. II opens with S. 4 which enacts that the executor is "the legal representative for all purposes," and that "all the property of the deceased person vests in him as such" Sections 90 (1) and (2) in Chapter VI runs as follows:—

"90 (1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4.

(2) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of immoveable property specified in the order in

manner permitted by the order."

It will be observed that this section was substituted for the original S. 90 by S. 14 of the Probate and Administration Act VI of 1889.

Taking Ss. 4 and 90 alone it would seem clear that probate is unnecessary. In fact S. 90 (2) expressly contemplates that an executor may dispose of immoveable property without a grant of probate. But he is subject to any restriction imposed by the Will, and that restriction he must comply with unless he obtains probate and gets an express order of the Court overriding it. It is not, however, contended and could not be contended, that the present will contains any such restriction.

So, too S. 92 expressly provides for probate if only one of the executors is to act. It contains no such restriction when all the executors are acting as here.

What necessity is there then in the present case for the executors to take out probate? In the first place, the Probate and Administration Act contains no section corresponding to S. 187 of the Indian Succession Act 1865 which provides that no right as executor can be established in any Court unless probate be first granted.

Nor was that an unintentional omission of the Legislature. That point was carefully considered and the history of the previous legislation was fully discussed in *Shaik Moosa* v. *Shaik Essa* (2) where the eventual finding of the Court was that the Probate and Administration Act enabled an executor of a Mahomedan will to establish his right in a Court of Justice without taking out probate.

If then he can do that, why cannot he sell under S. 90? The respondent's answer is that under S. 12, it is the probate which establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such and that under S. 59 it is the probate which is to be conclusive as to the representative title of the executor. Taking the Act, therefore, as a whole, they say it contemplates the necessity for probate.

(2) (1884) 8 Bom. 241.

To a large degree these arguments are concluded, by the judgment and reasoning of Sir Charles Sargent in *Shaik Moosa's* case with which I respectfully concur. As regards S. 12 it is a common place of English law that an executor derives his title from the will and not from the probate (see Halsbury, Vol. XIV, pp. 144,145). Accordingly in *Shaik Moosa's case* the learned Judge says at p. 254:—

"The section appears to us to be intended to be a condensed statement of the English law, which regards probate as the authenticated evidence of the will itself from which the executor derives his title, and by virtue of which the property of the testator vests in him from the death of the testator."

Then at p 255 after quoting S. 4, the learned Judge describes it as "a provision which enables the executor before probate to give a valid discharge to the debtor, and places him in the same position in that respect as an executor by English law."

It is true that S. 59 is not expressly mentioned, but in my judgment that section carries the matter very little further. It is of course of importance because it provides in effect that probate is to be conclusive evidence of the executor's title. But it does not negative his title in the absence of probate for that title is, as I have said, derived from the will. Even under an open contract I doubt whether the purchaser could require probate.

For instance under English law prior to the Land Transfer Act 1898, a purchaser from a devisee of real estate could not require the will to be proved in equity against the heirs-at-law, except under special circumstances (see Dart's Vendors and Purchasers, 7th Edn., Vol. I, p. 359).

However that may be, and I decide nothing as to that the present case is not one of an open contract. The purchaser has bought subject to special conditions which expressly debar him from obtaining this best proof. He must therefore fall back upon an inferior proof, *viz*, that of the existing affidavit and be content with that.

Two other cases were cited to us *viz*.. *Mirza Kurratulain Bahadur* v. *Nusbat-ud-Dowla Abbas Husain*

Khan (3) and *Sakina Bibee* v. *Mohamed Ishak* (4). In the former case the whole point was whether probate estopped the heirs of a Mahomedan testatrix from claiming as against a third party, moneys which he had obtained by undue influence from the testatrix, of whose will he was appointed executor.

Their Lordships held that there was no such estoppel. The executor when he had realised the estate was a bare trustee for the heirs as to two-thirds, and an active trustee as to one-third for the purposes of the will. The heirs *quoad* those two-thirds were claiming not under the will but adversely to it, and consequently could not be estopped from claiming two-thirds of the money which the executor had improperly obtained from the testatrix in her life-time. Their Lordships had not to consider there the effect of an unproved will. Still less had they to consider on executors power of sale. I decline, therefore to regard the case as a decision that probate of a Mahomedan will is essential.

In *Sakina Bibee's case* (4) the actual decision of Mr. Justice Pugh was that there is no provision in law rendering it obligatory in the case of a Mahomedan will to take out probate, and that accordingly it is admissible in evidence notwithstanding that no grant of probate has been obtained. In that decision I respectfully concur. But the learned Judge proceeded to consider what would be the position in law of such an executor, and the conclusion which he arrived at was that the executor would occupy the same position as that before the Probate and Administration Act 1881, *viz.*, that of a mere manager or agent.

This conclusion seems to be obiter for the only point for immediate decision was whether the will was admissible in evidence. But however this may be, and with all respect to the learned Judge, I am quite unable to agree with this conclusion. On the contrary, I think the position of a Mahomedan executor is governed by the Probate and Administration Act 1881 whether or no he takes out probate.

Thus as stated by Sir Charles Sargent in *Shaik Moosa's case* (2) at p. 254 "the object seems to have been to frame an Act which would be applicable to all natives of this country, whilst leaving the existing law as to those Hindus, to whom the Hindu Wills Act applied, untouched," and at p. 256 "since the passing of Act V of 1881 the powers of Mahomedan executors in cases in which that Act applies are no longer determined by Mahomedan law, but by the provisions of that Act".

In the result therefore, I am of opinion that under S. 4 the suit property vested in the appellants, and could be sold and conveyed by them under S. 90, and that no grant of probate is necessary either under S. 12 or S. 59 or otherwise.

It remains to consider one further point. Assuming probate be granted, could the executors even then sell without the consent of the heirs? From the short note before us, this would seem to be the difficulty which was present to the mind of the learned Chamber Judge. The point has not been pressed before us and in my opinion the apparent difficulty disappears on investigation.

The present is a case of testate succession and not of an intestacy. Executors have been appointed and consequently the right of the heirs is not to an aliquot two-thirds of all the testator's assets at his death. The debts and funeral expenses etc. have first to be paid, and then the estate realised, and it is only to two-thirds of such net assets that the heirs are entitled see *Mirza Kurratulain Bahadur* v. *Nusbat-ud-dowla Abbas Husain* (3).

Consequently until such two-thirds are ascertained, the executor is *prima facie* entitled to exercise his wide powers of disposition under S. 90. In the present case the auction sale was effected within the executor's year. Further it is clear that there are some debts, for the answer to requisition 12 shows the existence of a mortgage of one lac.

Under English law a purchaser of leaseholds would get a good title from an executor and would not be entitled to ask for proof of debts (see *In*

(3) (1905) 33 Cal. 116=32 I.A. 244=7 Bom. L.R. 876=9 C.W.N 938=1 C.L.J. 594=15 M.L.J. 336=2 A.L.J. 758=8 Sar. 839 (P.C.)

(4) (1910) 37 Cal. 839=15 C.W.N. 185 =8 I.C. 655.

re Venn and Furse's Contract (5).

Nor would he if the executor was selling freeholds under a charge of debts and legacies unless over twenty years had elapsed from the testator's death (see *In re Tanqueray-Williaume and Landau* (6). And now since the Land Transfer Act 1898 has vested realty in executors, substantially the above rule as regards lease holds applies also as regards freeholds, whether or no there is a charge of debts.

So too, in the present case I have no doubt that the purchaser will get a good title from the executors, and cannot be disturbed by the heirs. If the heirs have any grievance their remedy should be against the executors and not against the purchaser. But probably as an additional precaution an English conveyancer would advise the purchaser to have the existing mortgage kept alive rather than reconveyed (see Halsbury, Vol. XXI, p. 323 and *Gokuldoss Gopaldoss* v. *Rambux Sheochand*. (7) Under the above circumstances it is unnecessary to consider the effect of the special conditions of sale, nor whether on the face of those conditions the purchaser could in any event recover his deposit (see *In re Scott and Alvaros's Contract Scott* v. *Alvarez* (8)

In my judgment the respondent has been wrong throughout, and accordingly this appeal should be allowed with costs here and below. The formal questions in the Originating Summons should be answered as follows:—1, 2 and 3, yes, subject to the mortgage referred to in the vendor's answer No. 12 being reconveyed or transferred 4 and 5, No.

Fawcett, J.—I agree and have very little to add. The view taken by this Court in *Shaik Moosa* v. *Shaik Essa* (2) has been followed by the Calcutta and Madras High Courts in *Sakina Bibee* v. *Muhamed Ishak* (4) and *Ganapati Aiyar* v. *Sivamalai Gaundan* (9) respectively.

Section 90 of the Probate and Administration Act 1881, is, in my opinion, conclusive as to the power of the executors to sell the immoveable property in question and give a good title to the purchaser.

It is interesting to notice that originally this S. 90 gave much less extensive powers to executors to deal with the testator's property than those now conferred, and made the consent of the Court necessary to every disposition of property by him unless probate was taken out and the executor exempted by the Court from the necessity of obtaining such consent. The present section was substituted by the amending Act VI of 1889 and the change was therefore deliberate.

In the present case there is no restriction in the will on the power of the executors to dispose of the immoveable property so it is quite unnecessary under the terms of that section for the executors to take out probate. I may further refer to *Shri Beharilalji* v. *Bai Rajbai* (10) and *In the Goods of Indra Chandra Sing* (11) which lay down that, in the absence of any restriction in the will, S. 90 gives full power to an executor to sell immoveable property as if he were the owner.

I do not think this view is in any way weakened by the Privy Council decision in *Kurrutul ain Bahadur* v. *Nusbat-ud-Dowla Abbas Hossein Khan* (3), for in that case their Lordships recognised that an executor of a Mahomedan testator's will can realise the estate of the deceased under S. 90 of the Probate and Administration Act, though the testator can only deal with one-third of the property and the remaining two-thirds passes to his heirs, whatever the terms of the will may be.

They say 'Thus the executor, when he has realised the estate, is a bare trustee for the heirs as to two-thirds, and an active trustee as to one-third for the purposes of the will.

The words "when he has realised the estate" clearly show that their Lordships did not take a different view as to the power of the executor to sell in order to realise the estate.

I agree, therefore, in the answers and the order proposed by my learned brother.

Appeal allowed.

(5) (1894) 2 Ch. 101=63 L. J. Ch. 303=42 W. R. 440.
(6) (1882) 20 Ch. D. 465=51 L. J. Ch. 432.
(7) (1884) 10 Cal. 1035=11 I. A. 126 =4 Sar. 543 (P. C.)
(8) (1895) 2 Ch. 603=64 L. J. Ch. 821.
(9) (1912) 36 Mad. 575=12 M. L. T. 207=23 M. L. J. 306=17 I. C. 4. =(1912) M. W. N. 1112.
(10) (1899) 23 Bom. 342.
(11) (1896) 23 Cal. 580.

A. I. R. 1922 Bombay 397

MACLEOD, C. J. AND COYAJEE, J.

Chimabai Malgauda Patil—Plaintiff-Appellant

v.

Mallappa Payappa—Defendant-Respondent.

F. A. No. 249 of 1920 decided on 7th February 1922 from the decision of Sub. J. Belgaum in S. No. 8 of 1918.

Hindu law—Adoption—Adoption by husband—Wife is bound by the adoption-Whether valid or no.

Under Hindu law as administered in the Bombay Presidency a widow cannot dispute an adoption made by her husband whether valid or invalid. 28 Bom. L. R. 1272 Foll. [P. 397, C. 2.]

A. G. Desai—for Appellant.

K. N. Koyajee—for Respondent. No 1 to 3.

Macleod, C. J.—The plaintiff in this case is the widow of one Malgauda who died of plague on the 29th November 1915, and sues to recover possession of her husband's property against the first defendant who claims to be the adopted son of Malgauda. Various objections have been raised to the adoption, first that Malgauda having lost his brother Appu a few days previous to the date of the adoption was in mourning, and was, therefore, incapable of performing any religious ceremony; secondly, that the adopted son was the son of Malgauda's sister, and therefore could not be adopted; thirdly that the adoption did not take place at all, although it had to be admitted that an adoption deed was executed and registered.

On the 14th December 1915, the plaintiff made a petition to the Mamlatdar to have her name inserted in C and D Registers since her husband had died a fortnight back. In that petition she said that there were factions in the village, and therefore, the village officers might enter any other names But, on the 6th January 1916, she made a petition to the Collector admitting the adoption and requesting the first defendant's name to be entered in the Revenue Registers in place of the deceased Malgauda.

On the 7th January 1916, she was examined in connection with her petition and Varsa proceeding. She admitted the whole story which she now denies in the suit. The passing of orders on this petition was unfortunately delayed, so that the plaintiff for some reason or other made up her mind to dispute the first defendant's adoption.

On the 6th June 1916, she made a petition to the Collector saying that her husband did not adopt according to caste rites and customs, and that he could not adopt that boy according to Shastras. But she did not deny the fact that her husband had adopted the first defendant.

She was examined on 14th June 1916 when she pleaded that her previous statements had been made under coercion and threats; and for the first time she alleged that the first defendant was not present when he was alleged to have been adopted.

At the outset we are met with the question whether a widow could be allowed to dispute an adoption made by her husband In *Bhau Adgouda* v. *Narasa Gauda* (1) The plaintiff claimed as the adopted son of one Adgauda. He had been adopted by Adgauda's widow. The defendant was the son adopted by Adgauda in his life-time. Mr. Justice Shah at p. 1275 says

"Assuming, without deciding that the adoption of defendant No. 1 by Adgauda was invalid, the question is whether Sitabai the widow of Adgauda, could make another adoption to her husband during the life-time of the boy adopted by her husband. The point is one of first impression. No reported precedent on the point has been cited to us: and it must be considered in the light of the power, which the widow has in this Presidency to adopt, in the absence of any prohibition expressed or implied by her husband.

It seems to me clear that the widow is bound by the act of her husband and to accept all the implications of an adoption by him valid or invalid. In spite of the liberal interpretation of her powers to adopt in this Presidency, I do not think that the Hindu law contemplated, and certainly it has not provided that the widow could practically ignore and supersede her husband's act of adoption.

There is no authority for it: and I think that the general effect of the Hindu law of adoption is

(1) A. I. R. 1922 Bom. 300 = 46 Bom. 400 = 23 Bom. L. R. 1272.

against such a power. Even an invalid adoption may become effective under certain conditions: and the wife—or rather the widow—cannot go against her husband's wishes so unequivocally expressed or treat the adoption by her husband as non-existent."

And at p. 1278 the learned Judge concludes:

"It may appear somewhat anomalous that the widow should not be allowed to treat as non-existent an adoption by her husband which is invalid. But I do not think that there is anything anomalous in the widow being required to accept the act of adoption by her husband with all its implications at least so far as she herself is concerned."

It seems to me that an adoption by the husband whether valid or invalid would stand on much the same footing as a will, so that it would be considered as an implied prohibition against the widow adopting after the death of her husband. It was contended for the appellant that those remarks of the learned Judge were obiter, but they were directly in point, as they dealt expressly with the widow's power to adopt the plaintiff against the adoption by her husband, and if it could be said that the husband had impliedly prohibited an adoption by his widow by his having adopted in his life-time, it would necessarily follow that the validity of the plaintiff's adoption by the widow was directly in issue.

It does not seem necessary, therefore, to consider the other points which were raised in this case. But with regard to the factum of the adoption, all the evidence seems to point to the fact that it actually did take place, and that the suggestion by the widow seven months later that the adopted boy was not in Belgaum, when it was alleged he was adopted, must be considered as a desperate attempt to get rid of the first defendant's claim to succeed to Malgauda.

There are several witnesses who deposed that they were present at the adoption and that the first defendant was adopted. If the plaintiff really thought that the first defendant was not present she would have made that allegation at once instead of waiting for seven months when she felt the necessity, if she wished to succeed to her husband's estate, of proving some fact which would put an end to the claim of the first defendant.

On the question whether amongst Jains the adoption of a sister's son is invalid, no doubt there is no judicial decision to the effect that Jains do not observe the same law as the regenerate classes. Therefore, if the question had to be decided in this case evidence would have to be led to prove the custom that the adoption of a sister's son amongst Jains is acknowledged.

Then on the question whether Malgauda could not have adopted owing to his being in mourning, we have been referred to no direct authority on the question. But it is argued that as Malgauda was in mourning, he was not competent to perform any religious ceremony, and therefore, could not adopt. But the evidence certainly points to the fact that amongst Jains adoption is not looked upon in the same way as amongst the regenerate classes, and that adoption is really more a secular than a religious ceremony. The appeal, therefore, must be dismissed with costs.

Coyajee, J.—I agree in holding that this appeal must fail. In *Bhau* v. *Narasugauda* (1) which was a case decided by a Division Bench of this Court Mr. Justice Shah observes at p. 1276: "It seems to me clear that the widow is bound by the act of her husband and to accept all the implications of an adoption by him valid or invalid."

I am bound to respect this opinion as coming from a learned Hindu Judge. I do so the more readily because we are in this case dealing with an adoption by a Hindu of his sister's son; and it is matter of common knowledge that in the Bombay Presidency adoptions of daughter's sons and sister's sons are not uncommon. For this proposition we have the high authority of Mr. Mandlik who in his Vyavahara Mayukh, Part II at p. 493 observes;

"I must note that the existence of a time-honoured custom allowing the adoption of a *dauhitra* (daughter's son) or *bhagineya* (sister's son, is testified to in distinct terms by the Dvaita Nirnaya

and the Vyavahara Mayukh, and also implied by Krishna Bhatta. I have made special inquiries on the subject, and I have no hesitation in stating that in this Presidency such adoptions are common, and not the slightest taint attaches to them on account of such relationship."

Special usages in favour of adoptions of daughter's sons and sister's sons have, moreover, been judicially recognised in some of the Districts of this Presidency. I need only refer to the judgments of Candy J. and Fulton J. in *Manjunath* v. *Caveribai* (2).

For these reasons I agree in holding that it is not competent to the plaintiff, who is the widow of Malgauda, to seek to set aside the adoption made by her husband.

Appeal dismissed.

(2) (1902) 4 Bom. L. R. 140.

A. I. R. 1922 Bombay 399

MACLEOD, C. J. AND SHAH, J.

K. P. Frenchman—Appellant.

v.

Assistant Collector, Haveli—Respondent.

F. A. No. 339 of 1920 decided on 17th March 1922 from the decision of D. J. of Poona in Ref. No. 11 of 1919.

Land Acquisition Act, S.18—Compensation—Valuation of land should not be less than what the claimant had purchased it for.

The appellant purchased in July 1918 for Rs. 92,500 a piece of land with a bungalow on it which was compulsorily acquired by Government in April 1919.

Held—In coming to a decision with regard to the market value of the land on the date of its compulsory acquisition the two most important questions are (1) whether the claimant has paid so high a price that the Court may consider that he had not displayed the ordinary caution which a purchaser of land should display; and (2) whether there has been any increase in the value of property in the neighbourhood within the few months which elapsed between his purchase and the Government Notification. [Page 399, C. 2, Page 400, C. 1, 2]

The Government have wide powers under the Act to deprive a man of his property and it is only fair that he should be recouped on a liberal scale. Any endeavours to unduly depreciate the value of properties that have to be acquired in order that Government may acquire as cheaply as possible should be condemned equally with the exaggerated valuations put by claimants. [P. 401, C. 1.]

Campbell for *Payne & Co.*,—for Appellant.

T. Strangman and *S. S. Patkar*—for Respondent.

Macleod, C. J.—This is an appeal from the decision of the District Judge of Poona in a reference under S. 18 of the Land Acquisition Act. The land in reference is a square piece of land measuring 4,77 acres with good frontages on Connaught Road and Wellesley Road. In the far corner of it there was a bungalow, which undoubtedly at the time the property was notified for acquisition on the 25th April 1919, was in a state of disrepair. The property is situated certainly near the centre of the business part of the Poona City, excluding of course the city proper. All round there are public offices, hotels, churches, shops and other such premises.

I think the Judge is right in saying that it is not quite in the best situation, either for being used for residential purposes or for shops which are patronised by European customers. At the same time it cannot be doubted that the property is in the centre of what I may call the business quarter of the town.

The claimant bought the property from Mrs. Sassoon for Rs. 92,500 in July 1918. Mrs. Sassoon had not been in India for some years, and her affairs were being looked after by her agents. The property had not been very well looked after. The bungalow was rented by Mr. Defreece at Rs. 150 a month, and we may safely say that however favourable the situation of the property may have been, it does not appear from the evidence that there had been much demand for it before its acquisition.

But for whatever reasons the claimant bought the property in 1918, there can be no doubt that that was a purchase by a willing purchaser from a willing seller, and it is, in the first place, direct evidence of the market value of the property in July 1918. It would be open to the claimant to show that in this neighbourhood there has been a general rise in the value of property between July 1918 and April 1919, but he has absolutely

failed to produce any evidence to show that the value of property in this neighbourhood has increased.

Of course it may be said that from the very nature of the use to which the surrounding properties are put, it would not be likely that many of these properties would come into the market. Still if the claimant wishes to show that his property in April 1919 was worth more than what he gave for it, he would have to produce evidence to that effect.

On the other hand it would be open to Government to show that the claimant, when he purchased the property, had taken a far too sanguine a view of its possibilities in the future. The Acquisition Officer without considering the price which the claimant had paid for the property has in the offer he made to the claimant done everything he could to cut down the value of the property.

He has valued the bungalow on a rental of Rs. 300 a month with a life 26 years. To that he has added the deferred value of the site at the end of the period and the value of the compound 14334 square yards at Rs. 6,000 an acre or a little more than a rupee a square yard, the whole giving a total of Rs. 55,688, to which had to be added the 15 per cent. for compulsory acquisition. Now that was a very low offer to make to a man who had purchased the property a few months before for Rs. 92,500.

On the other hand the claimant went to the other extreme. He produced a report by Mr. Fritchley, another by Mr Bhedwar, and a third by Mr. Batley all containing fantastic conglomerations of figures produced for the purpose of satisfying the Court that the property which the claimant had purchased for Rs. 92,500 in July 1918 was worth over two lacs in April 1919. They are obviously worthless.

This is one of those numerous cases which show how undesirable it is that valuations for compulsory land acquisition should be brought before a Court of law. If this case had gone before an arbitrator, the whole of these elaborate calculations would have been swept aside in a few words.

But in a Court of law such evidence cannot be excluded and the Court of first instance has to seriously consider all the various hypothetical considerations produced on the one side or the other. Speaking for myself, in dealing with the case in appeal, it is open to us to express an opinion that all those calculations are of no assistance whatever in enabling the Court to come to a decision with regard to the market value of the land in April 1919.

The two most important questions are (1) whether the claimant has paid so high a price that the Court may consider that he had not displayed the ordinary caution which a purchaser of land should display; (2) whether there has been any increase in the value of property in the neighbourhood within the few months which elapsed between his purchase and the Government Notification to show that the property in April 1919 was worth more than what he gave for it.

I see no reason to think that the price of Rs 92,500 which the claimant gave for the property in July 1918 was not a fair market value of the property. But I think he has failed entirely to prove that there was any chance of a purchaser being found in April 1919 who would give more than that price for the property. No doubt, in considering the question of value from a purely hypothetical point of view, it would be open to both sides to try and show, the one that in whatever manner the property was developed, the property would not realize as much as Rs. 92,500, the other that it would realize considerably more.

One side would be inclined to cast as much doubt as possible on the probabilities of profitable user, while the other side would endeavour to show that every portion of the property would be put to a very profitable use; so that the capital value would amount to very much more than the purchase price.

But all those considerations are purely hypothetical, and a great deal of the arguments used by the experts on both sides, the one to appreciate, the other to depreciate the value, if one took the trouble to analyse them, would be found to have very little value. It seems to me that when Government notified this property for compulsory acquisition in April 1919, they were bound to offer the clai-

mant what he had given a few months before for the property, unless they were able to show conclusively that he had not given a fair value for the property. After all the Government have very wide powers under the Land Acquisition Act to deprive a man of his property, and it is only fair that he should be recouped on a liberal scale; any endeavours to unduly depreciate the value of properties that have to be acquired in order that Government may acquire as cheaply as possible, should be condemned equally with the exaggerated valuations put forward by claimants.

It seems to me on a consideration of all the evidence in the case, that it all amounts to this, the claimant has not proved that he could have realized more for this property in April 1919 than what he paid for it. The Government have not proved that if it was put in the market it would realize less. From the evidence it is difficult to see how a fair rent could have been obtained for the bungalow without spending a considerable amount in repairing and furnishing it. The property as it stands can best be valued at an all over rate per acre giving the fullest consideration to its situation.

Looking at it in this way the claimant paid about 16,000 rupees an acre. This on the evidence was a very fair rate and even the witness Hormasji Sorabji did not put the value of the land higher than Rs. 15,000 an acre though he undoubtedly put an exaggerated value on the bungalow. Therefore I think that the claimant should be awarded Rs. 92,500 together with 15 per cent. for a compulsory acquisition. I would once more refer to the futility of elaborate calculations which purport to enable one to ascertain the marketable value of property almost to annas and pies, and I would draw attention, in illustration of that, to the calculations made by the District Judge by which he arrived at the conclusion that the property was worth Rs. 90,193.

The valuation of immoveable property is not an exact science, and the very best efforts of an expert or a Court to fix a market value for a property like this can never amount to much more than a quasi-scientific guess, which the Court should, in the case of compulsory acquisition temper with liberality. Considering the appellant made a claim for two lacs even here, there will be no order as to costs.

Shah, J:—I agree that the market value in this case should be fixed at Rs. 92,500, which is the amount paid by the claimant for this property in July 1918. I do not think that under the circumstances of this case the figures supplied to the lower Court on certain hypothetical bases afford any assistance to the Court in determining the true market value. The only safe basis which on the facts of this case is most favourable to the claimant, is the price which he paid for the property in July 1918.

In spite of the argument of the learned Advocate General to the contrary, there is nothing on the record of this case to show that that was not a fair market price at the time when he purchased the property. The fact that he paid that amount is indicative of the then value of the property and unless there is anything definite on the record to justify the result that the market value was really less than what he paid for it at the time, that argument could not be accepted.

The only question which presents some difficulty to my mind is whether the claimant is entitled to anything more than the amount which he paid in July 1918 on the ground that there was some increase in the value of the property from July 1918 to April 1919, when it was notified for acquisition. It may be that there was some rise generally speaking in the value of properties at Poona during that interval; but it was for the claimant to prove that during that period, *i. e.*, from July 1918 to April 1919, there had been such appreciable rise that he was entitled to some extra compensation on that account. Though I am rather inclined on general grounds to favour the view that probably there was some rise in the values of properties in this locality during that period, in the absence of any evidence on that point it is not possible to give effect to that consideration. I think, therefore, that the highest amount that the claimant could be awarded as the market value of the property is the

amount which he paid in July 1918.

Decree Varied.

A. I. R. 1922 Bombay 402.

PRATT AND FAWCETT, JJ.

Narayan Ramchandra Thita—Defendant—Appellant.

v.

Pandurang Balakrishna Deshpande—Plaintiff—Respondent.

Letters Patent Appeal No. 46 of 1921 decided on 7th March 1922 from the decision of Macleod, C.J in S. A. No. 123 of 1921.

(a) *Bombay Land Revenue Code* (1879), *Sec. 83—Tenancy—Presumption—Commencement of the tenancy—Means commencement within a particular period of time.*

In a case where the tenancy does not go back into obscurity but is bounded by a definite time or period, there is satisfactory evidence of the commencement of the tenancy within the meaning of S 83 and the presumption in favour of the tenant that the tenancy is co-extensive in time with the tenure of the landlord does not arise. 18 Bom. 433 Foll.

[P. 403, C. 1, 2.]

(b) *Landlord and Tenant—Permanent Tenancy*

Long payment of rent at fixed rate is not by itself sufficient to show permanent tenancy.

[P. 403, C 2.]

(c) *T P. Act, S. 106—Tenancy commenced at a known period—Presumption is of annual tenancy*

Where it is shown that a tenancy commenced from a particular period the ordinary presumption contained in S 106, that the tenancy is an annual one, should be drawn. [P 403, C. 2.]

Bahadurji and S. Patkar—for Appellant

P. B. Shingne—for Respondent.

Pratt, J.—The question raised in this appeal is whether the defendants are permanent tenants of the lands in suit which are described as the Bhavani and the Hulesh war lands The lower appellate Court has held that they are not. The appeal is not pressed as regards the Bhavani lands, for it has been definitely ascertained that the tenancy began in the year 1851. As to Hulesh war lands, it is contended that the defendants were entitled to the presumption enacted in the second clause of S. 83 of the Bombay Land Revenue Code.

The plaintiff's landlord acquired the lands by gift from the Raja of Satara in 1830. The lands then were *pad* or uncultivated and there was no tenant in occupation. The receipts show that the plaintiff's grandfather was in occupation as tenant in 1850; the tenancy must, therefore, have begun between 1830 and 1850. It is now settled by *Chikko* v. *Sidhnath* (1) that the phrase "commencement of the tenancy" in S. 83 refers to the time and not to the terms of the tenancy. In *Ramchandra* v. *Anant* (2) it was held that the presumption in section 83 might be available to a tenant although it was shown that the tenancy began after the beginning of the landlord's title. However that may be, I agree with the criticisms of *Ramchandra* v. *Anant* (2) in the judgment in *Rango* v. *Sidlingappa* (3) and judgment of Macleod C. J. in *Sidhanath* v. *Chikko* (4). But I do not read the judgment of the Chief Justice in *Sidhanath* v *Chikko* as necessitating proof that the tenancy began in a particular year. This same case went on appeal in *Chikko* v. *Sidhanath* (1) and the time from which the tenancy was proved to have commenced was found not to be a particular year, but a period "in or after the year 1805". I think that the presumption applies only when the time, *i.e.* rather the date or the period of the commencement of the tenancy is not proved by satisfactory evidence. Here the period is proved to have been between 1830 and 1850, and that seems to me to be sufficient to negative the presumption. For, as said in *Rango* v. *Sidlingappa* (3) directly it is shown that the tenancy commenced from a particular period, the ordinary presumption that is now contained in S 106 of the Transfer of Property Act will have to be drawn. The presumption in this case is not that enacted in S. 83 of the Bombay Land Revenue Code but that enacted in S. 106 of the Transfer of Property Act that the defendants are annual tenants. I think there are no other circumstances from which the presumption of permanent tenancy can be made. Long payment of rent at fixed rate is not by itself sufficient to show permanent tenancy. There is no evidence that the building of the well was encouraged by the landlord or that the tenant's mortgage was recognised by him. I would, therefore, confirm the decree of the Lower appellate Court and dismiss the appeal with costs.

Fawcett, J.—I agree generally with the reasoning of my learned brother. The phraseology of the second paragraph of section 83 is no doubt somewhat vague and there are two opposite views that can be taken of the exact

(1) A.I.R. 1922 Bom. 25=46 Bom. 687=24 Bom. L.R. 226.

(2) (1893) 18 Bom. 433.

(3) (1898) P.J 82.

(4) A.I.R. 1921 Bom. 454=23 Bom L. R. 533.

meaning to be put on the word "commencement" One that has been placed before us by the appellant is that it necessitates satisfactory evidence that the tenancy commenced at any rate in a particular year. The other view is that it suffices to show a particular period of time beyond which the tenancy certainly did not go. Dealing broadly with the first point of view, I do not think that logically there is good ground for saying that a particular year is the real test contemplated by the Legislature.

The primary point of commencement is of course the actual date on which the tenancy began and the fixing of the particular year really means no more than saying that the tenancy commenced, at some point of time within twelve months. But why should one be limited to the particular division of time represented by a month? I can see no logical basis for saying that you are so justified in taking a number of months, but not justified in taking a number of years as sufficient. Therefore if the learned Chief Justice in *Sidhanath* v. *Chikko* (4) intended to lay down that it is necessary to show that a tenancy has commenced in a particular year in order to deprive a tenant of the presumption in S. 83, then I respectfully dissent. That would be a very fortuitous test to apply. For instance there might easily be a case where evidence showed that the tenancy must have commenced after the year 1868 and before the year 1871, but did not show that it commenced in the particular year 1869 or 1870. Can it reasonably be said that this defect prevents there being satisfactory evidence of the commencement of the tenancy? I do not think that this can have been intended by the Legislature In my opinion the presumption operates when, owing to the antiquity of the tenancy, you cannot fix on any particular point or period of time as that at or within which the tenancy commenced. Once you get a particular time, as in this case, you get the years 1830 to 1850 between which the tenancy must have begun, then there is a commencement within a certain period shown which bars the presumption arising.

At the same time this treatment of a period as sufficient to satisfy the requirements of S. 83 must of course be applied with reasonable limits. I do not for instance mean to say that it would suffice to show that a tenancy had commenced *after the flood*. It is not, I think, necessary to define what are 'reasonable limits'; it is enough for the purposes of this case to say that the period, 1830 to 1850, is clearly a reasonable one.

But if it were necessary, recourse might perhaps be had to the common law rule under which the year 1189 is regarded as the commencement of legal memory, and the presumption, which the evidence might otherwise raise in favour of the existence of a custom, is rebutted by proof that it first existed subsequently to that year: see Halsbury's Laws of England, Vol. 10, Art. 441, at p. 233, If a clearer definition is essential or desirable, then the remedy is to amend S. 83 by Legislature, so as to express clearly what is intended.

I agree with my learned brother that there is no reason to differ from the view taken in *Ramachandra Narayan Mantri* v. *Anant* (2) that the mere fact of a tenancy having commenced subsequent to the landlord's tenancy does not prevent the application of S. 83 because there may be cases where in spite of that the commencement of the tenancy is in obscurity.

But when you get a case where the tenancy does not go back into obscurity but is bounded by a definite time or period, then, in my opinion, there is satisfactory evidence of the commencement of the tenancy within the meaning of S. 83, and the presumption in favour of the tenant does not arise.

Both the lower Courts have held that apart from the presumption under S. 83, the circumstances of the case do not justify the finding that the respondents are permanent tenants, and there is no error of law shown which would justify us in taking a different view. Accordingly, I agree that the appeal must be dismissed with costs.

Per Curiam:—We vary the decree of the lower Court by adding a direction that the defendants do pay future mesne profits at the rate of Rs. 40 for 1918 and 1919 till date of delivery of possession.

The application for stay of execution

falls with the appeal and is dismissed with costs.

No order as to costs of the cross-objections.

Appeal dismissed.

A. I. R. 1922 Bombay 404

MACLEOD, C. J. AND COYAJEE, J.

Simon Reuben and others—Plaintiffs—Appellants.

v.

Haji Shaikh Mahomed Shustary—Defendant-Respondent.

O. C. J. A. No. 130 of 1921 decided on 3rd March 1922 from the decision of Kajiji, J.

(a) *Specific Relief Act, S. 21 (c) Lease-Conditions of lease to be determined subsequently—Uncertainty—Contract cannot be enforced.*

Where an agreement ran:—"We agree to rent to Mr. Haji Shaikh Mahomed Shustary the top floor of our building under construction at Plot No. 3 Ballard Estate for a period of five years and five years' option at a monthly rent of Rs. 1,500 only from the date of the completion of the same subject to the conditions and entering into a regular lease. A deposit of three months' rent amounting to Rs. 4,500 only is paid on signing of this contract."

[P. 404, C. 2.]

Held: (1) that the above writing could not be considered as a concluded agreement for it was impossible for the parties to draw up a formal lease in accordance with that writing as its terms were too uncertain to be reduced to a formal document, and the words "subject to the conditions and entering into regular lease" made the "entering into a regular lease" a condition precedent to the parties coming to a definite agreement. [P. 404, C. 2.]

(2) That the writing was, therefore, not a document which the Court could direct to be specifically performed. 21 Bom. L. R. 1047.

(b) *Deed—Construction—Words "Subject' to."*

The effect of the words "subject to" in a deed is to introduce condition or proviso 7 Ch D. 29 : 2 Ch.D. 744 and 87 L. T 547 Foll.

[P. 405, C. 1.]

T. Strangman, Coltman and *Campbell*—for Appellants.

Inverarity, Mulla and *Desai*—for Respondents.

Macleod, C. J.—The plaintiff filed this suit for specific performance of an alleged agreement with the first and second defendants to let the third floor of a building on the Ballard Estate. The agreement which he asked the Court to specifically perform is at page 1, Part III, and runs as follows.

"We agree to rent to Mr. Haji Shaikh Mahomed Shustary the top floor of our building under construction at Plot No. 3 Ballard Estate for a period of five years and five years' option at a monthly rent of Rs. 1,500 only from the date of the completion of the same subject to the conditions and entering into a regular lease. A deposit of three months' rent amounting to Rs. 4,500 only is paid on signing of this contract."

The learned Judge has passed a decree in favour of the plaintiff directing the defendant to specifically perform the agreement and execute in favour of the plaintiff a lease of the third floor of the building situated on the Ballard Estate for a term of five years from the completion of the said building, with an option to the plaintiff for a further period of five years at a monthly rent of Rs. 1,500 such lease to contain the usual covenants.

The defendants have appealed.

We are of opinion that the document Ex. A could not be considered as a concluded agreement. First it would be impossible for the parties to draw up a formal lease in accordance with this document because its terms are too uncertain to be reduced to a formal document, and secondly, it contains the words "subject to the conditions and entering into a regular lease", which made the "entering into a regular lease" a condition precedent to the parties coming to a definite agreement.

The learned Judge has considered that the words "subject to conditions" means "usual conditions", namely, conditions which have to be incorporated in a formal document when prepared by a solicitor. But the word "usual" is not in the document, and, even if it were it would only amount to this, that when a formal document came to be prepared, the draftsman could enter in the document the usual covenants which are to be found in leases of office buildings in Bombay, and it would be open to the other side either to alter or add to those conditions, and it would be only when the draft had been finally agreed to, that the terms of the lease could be ascertained.

But even if the nature of the conditions has been defined, and no room for further discussion was left, the words "subject to entering into a regular lease" would remain to be construed, and it is difficult to see how one could avoid bring-

ing the case within the authority of *Govind* v. *Hirachand*. (1), in *Winn* v. *Bull* (2), *Lloyd* v. *Nowell* (3), and *Watson* v. *McAllum* (4), it was held that the effect of the words "subject to" was to introduce a condition or proviso.

It seem obvious to me, therefore, that this is a document which the Court cannot possibly direct to be specifically performed. It was merely the result of preliminary negotiations, which defined a portion of the terms to appear in the lease as eventually settled, while it left a great many of the terms to be agreed upon thereafter, so that the final agreement between the parties depended on a regular lease which was to be executed. The appeal, therefore, must be allowed and the suit dismissed with costs throughout.

With regard to the deposit the defendants can apply to the Court of first instance under S 144, Civil Procedure Code. The deposit can be retained for a fortnight after the decree of this Court is sealed, in order to enable them to make that application. If the application is not made, the deposit will have to be returned.

Appeal allowed.

(1) (1919) 21 Bom. L. R. 1047=53 I. C. 805.

(2) (1877) 7 Ch. D. 29=47 L.J. Ch. 139=26 W.R. 230.

(3) (1895) 2 Ch D.744=64 L.J.Ch. 744=13 R. 712=73 L.T. 154=44 W. R. 43.

(4) (1903) 87 L.T. 547.

A.I.R. 1922 Bombay 405.

MACLEOD, C.J. AND SHAH, J.

Bai Tara —Appellant.

v.

Mohanlal Lallubhai and others—Respondents.

F. A No. 226 of 1921 decided on 16th March 1922 from the decision of Joint-J., Ahmedabad, in Mis. Application No. 44 of 1921.

(a) *Guardians and Wards Act (VIII of 1890) Ss 19, 25—Custody of minor son—Application for guardianship by father is not competent.*

An application under the Guardians and Wards Act made by the father to be appointed guardian of the person of his minor son living with his mother and to have his custody, presumably, under S. 19, is not competent; he, being the natural guardian, can apply under S. 25 for the minor's return to his custody. [P. 405, C. 2.]

(b) *Guardians and Wards Act, S 25—Application for custody of Minor—Question to be considered is welfare of minor.*

In an application by a father to obtain custody of his minor son, the only question to be considered is whether it will be in the interests and welfare of the minor to return to the custody of the father. 38 Mad 807 Rel. on. [P. 406, C. 1, 2.]

H. V. Divatia—for Appellants.

G. N. Thakor and *R. J. Thakor*—for Respondents.

Macleod, C. J.—The petitioner filed this application under the Guardians and Wards Act to be appointed guardian of the person of his minor son, who was living with his mother opponent No. 4 and his maternal grandfather opponent No. 5. I may point out at once that the application ought to have been dismissed, because such an application by a Hindu father under the Guardians and Wards Act, presumably under S. 19, is not competent, and a considerable amount of confusion has arisen in the course of the argument from neglecting to recognise that fact.

The application should have been made under S. 25 of the Guardians and Wards Act because it is admitted that under Hindu law the father is the natural guardian of his minor son, and he can apply to the Court, if his ward leaves or is removed from his custody, for an order for the minor's return, and the Court will, if it is of opinion that it will be for the welfare of the ward to return to his guardian, make such an order.

The facts of this case make it perfectly clear that it is not to the interests of the minor that the Court should make such an order. Unfortunately there have been disagreements between the petitioner and his first wife, with the result that for some years she has been living separate with her father and has had the custody of the boy. The petitioner has married again, and it is obvious that the boy, who was only seven years old at the time this application was made, will be much better off living with his mother than with his father.

No suggestion whatever has been made as to the character of the mother, which would be good ground for taking away the boy from her tender care and handing him over to the father who would be a perfect stranger to him. The step-mother cannot be expected to be very much interested in his welfare, and the uncles and any members of the prior generation who may be living in the house will also not be likely to give this small boy the attention and sympathy which he naturally requires.

Once it is recognised that the application should have been made under S. 25 of the Act, and not under S. 19, which has nothing whatever to do with the case, a decision can easily be arrived at. We have nothing to do

with the question whether the father is unfit to be the guardian of the person of the minor. That would only be at issue if there was an application by another person to have a guardian appointed other than the father; and we have to accept the facts as we find them, that this small boy has been living with his mother for the last five years, and apparently the father has acquiesced in that.

As my learned brother has pointed out, it is really a question what is the proper time for the father to make an application to the Court to obtain the custody of his son, and that question must depend entirely upon the further question when it will be for the interests and welfare of the minor to return to the custody of his father.

We were referred to the case of *Annie Besant* v. *Narayaniah* (1) as being in favour of the respondents, but when that case is read, it will be found that it is entirely in favour of the appellant in this case. The father there had accepted an offer made by the defendant to take charge of his two sons for educating them in England. He was dissatisfied later on with the arrangement, so he wanted to get back the custody of his children. Their Lordships said at p. 634:

"The real question was whether he (the father) was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education. The real question was whether in the events which had happened the plaintiff was at liberty to revoke it (the authority given by the said letter.) Both questions fell to be determined having regard to the interests and welfare of the infants, bearing in mind, of course, their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants, and in their presence."

Therefore treating it as an application under S. 25 of the Guardians and Wards Act asking the Court to direct the return of the boy to the father, I think myself it is distinctly to the interests and welfare of the boy to remain with his mother. That of course will not prevent the father from making a further application, at any later date when he may be able to satisfy the Court that it will then be to the interests and welfare of the minor that he should leave his mother's care and live with his father.

The appeal must be allowed and the application dismissed with costs throughout.

The cross-objections are dismissed with costs.

Shah, J.—I concur in the order proposed by the Chief Justice. I desire to add that this order is made on the footing that the application made to the District Court by the father is one under S. 25 of the Guardians and Wards Act for the custody of the minor. It is not necessary for the purposes of this appeal to decide the question as to whether a father can properly make an application under the Guardians and Wards Act to be formally appointed the guardian of his minor son.

That was evidently not necessary in the present case; and though the application is in form for such an appointment, it is in substance an application for the custody of the minor and must be treated and disposed of as such. On that footing the only question is whether it is for the welfare of the minor that the existing custody of the mother should be disturbed. It is unfortunate that owing to the differences between the father and the mother it has become necessary to consider this question; and it is possible that in future these differences may be made up and that the interests of the minor may be advanced by the co-operation of the father and the mother in that respect. But at present it seems to me fairly clear that it is not desirable for the welfare of the minor that the custody should be changed. The boy is of tender age and I think that at present the personal care of the mother is a paramount consideration.

On that ground I agree that the present application of the father for the custody of his minor son should be dismissed.

Appeal allowed.

(1) A. I. R. 1914 P. C. 41=38 Mad. 807=41 I. A. 314=16 Bom. L. R. 625=27 M. L. J. 30=18 C. W. N. 1089=1 L. W. 520=(1914) M. W. N. 585=16 M. L. J. 165=20 C. L. J. 253=12 A. L. J. 1155 (P. C.).

A. I. R. 1922 Bombay 407

MACLEOD, C. J., AND COYAJEE, J.

Dhundiraj Balkrishna Phalinkar—Defendant-Appellant.

v.

Ramchandra Gangadhar Kale and others—Plaintiffs-Respondents.

S. A. No. 385 of 1921 decided on 27th January 1922 from the decision of Joint J., Poona in A. No. 308 of 1920.

Easements Act (V of 1882), S. 22—Right to a line of way once set out cannot be altered.

When a line of way is once definitely set out, neither the dominant nor the servient owner can compel the other to give or accept a different and substituted way; the provisions of S. 22 of the Easements Act can only apply, when the exact way to be taken over the premises of the servient owner has not been ascertained.—61 L. T. 377 Foll.

[P. 407, C, 2.]

P. B. Shingne—for Appellant.

G. N. Thakor for *K. V. Joshi*—for Respondents.

Macleod, C. J.—The question in this second appeal is whether the order of the lower appellate Court restraining the defendant from obstructing the plaintiff's Bhangi and Bhisti from entering by the door X in the map Exhibit 20 and thence passing over the defendant's back-yard and entering the plaintiffs' privy at point A is right.

Defendant's house adjoins the plaintiff's house to the west. There is a lane to the west of the defendant's house and it is admitted that the plaintiffs have a right of way over the defendant's back-yard, so that the sweeper may have access to the plaintiffs' privy. The defendant bought his house in 1915. Until then the sweeper had passed through the door X but in 1916 the defendant made certain alterations. He opened a door at the southern end of his wall and after reserving a passage of about three feet he built a wall to the north, so as to reserve for himself the rest of the back-yard.

It cannot be said that it would be in any way more inconvenient for the sweeper to pass along this passage to the plaintiffs' privy instead of going in by the door X as he used to do, but the plaintiffs contend that they are entitled to stand on their strict right, that the right of way from the door X to their privy having once been acquired, the servient owner cannot substitute any other way between the lane and the plaintiffs' privy. The trial Judge appears to have admitted this proposition of law to be correct, but considered that the plaintiffs were agreeable to the new arrangement when he visited the spot. Because the second plaintiff had adduced no evidence to show that the defendant had made the alterations against his will or without his consent, the learned Judge appears to have held that there was acquiescence on the part of the plaintiffs, and that it was owing to other disputes having arisen between the parties relating to the ownership of the party wall and certain windows in the plaintiffs' house that the plaintiffs began to object to the obstruction at door X.

If an issue had been raised on the point of acquiescence this finding might have been entitled to consideration but the Judge seems to have thought that the plaintiffs, even if the issue had not been raised, ought to have called evidence to prove that they had not acquiesced, and, as the appellate Court has pointed out, the defendant never pleaded consent, no issue was raised, and the evidence was not directed to it. It would, therefore, be dangerous to assume that consent had been given.

I do not think that S. 22 of the Indian Easements Act can assist the defendant. Its provisions can only apply when the exact way to be taken over the premises of the servient owner has not been ascertained. Whether the servient owner, when once the right of way has been defined, can substitute a new way is a question which does not seem to have been provided for by the Indian Easements Act and therefore we must have recourse to the Common Law: *Lowell* v. *Smith* (1); *Hulbert* v. *Dale* (2); and *John Young* v. *Robert Kinloch*. (3) No doubt the general rule is that a right of way once defined cannot be altered. *Deacon* v. *The South Eastern Railway Company* (4) and the dominant owner is entitled to exercise his strict rights unless he

(1) (1857) 3 C. B. N. S., 120=140E. R. 685.

(2) (1909) 2 Ch. 570=101 L. T. 504=78 L. J. Ch. 457.

(3) (1910) A. C. 169.

(4) (1889) 61 L. T. 377.

can be induced to consent to a deviation. The defendant was aware of the existing right of way when he bought his premises and unless he can prove acquiescence in the new way the plaintiffs must succeed.

The appeal must be dismissed with costs.

Coyajee, J.—I concur, and would add that Courts in this country have given effect to the general rule that when once the line of way has been definitely set out, neither the dominant nor the servient owner can compel the other to give or to accept a different and a substituted way.

In *Hamid Hossein* v. *Gervain* (5) Norman, C. J. observed: "We think it is clear that, if any person has a right of way from one place to another over a particular line, if he and his ancestors have been accustomed to use that way from a long time past, he has a right to go over it, and cannot be compelled to use a *different* and *substituted* way". Similarly, in *Varajlal Parbhudas* v. *Moti Kuber*, (6) where the facts were not widely different from those in this case, this Court held that: "If the defendant's right of way was directly from the door in plaintiff's *osri* to the defendant's *osri*, the plaintiff cannot obstruct that right of way and offer him another way through his *chowk*."

In my opinion, therefore, the decision of the lower appellate Court is right.

Appeal dismissed.

(5) (1871) 15 W. R 496.
(6) (1893) P. J. 473.

A. I. R. 1922 Bombay 408

SHAH, AG. C.J. AND CRUMP, J.

Manilal Dharamsi—Appellant

v.

Allibhai Chagla—Respondent.

S.C.C. Ref. No. 4 of 1922 decided on 19th June 1922 by Third J. of Presidency Court of Small Causes, Bombay.

Contract Act, S. 30—Wagering contracts—Teji Mandi contracts—No general presumption—Proof of Common intention is necessary in each case.

There is no legal presumption that a *Teji* or *Mandi* contract is a wagering contract and it must be dealt with as any other contract, and the rules that have been laid down for determining whether a contract is a wagering contract or not are applicable to this case. The test is where it is shown that a common intention of the parties was that in no case delivery was to be taken or given but that in all cases differences should be paid, then the parties are wagering. [P. 408, C. 2, P. 409, C. 1, 2.]

Kania—for Appellant.

Kanga and *Petigara*—for Respondent.

Shah, Ag. C. J.—This is a reference from the Presidency Small Cause Court, Bombay, under S. 69 of the Presidency Small Cause Courts Act. The question referred to us is: "Are Teji Mandi contracts to be held as being wagers on account of their apparent nature and characteristics alone without any other proof of the intentions of the contracting parties or is evidence necessary to prove that such contracts were intended to be wagers?"

It appears from the terms of the reference that the learned Judge has felt some doubt on the point in view of the practice that is stated to be prevalent in the Presidency Small Cause Courts of treating such contracts as wagers without any further proof that they are wagers. The learned Judge was of opinion that the practice was not justified and that in every case of such contracts, as in every other case, it must be proved whether the contracts were in the nature of wagers, that is, whether the common intention of the contracting parties at the time of the contract was to deal only in differences and under no circumstances to call for or give delivery.

In the first place, I desire to point out that this is hardly a question of law, or usage having the force of law, and I am not sure whether the reference could have been made. It was not only open to the Judge, but I think it was his duty, to decide, according to his view of the evidence in the particular case before him giving such weight as he might have thought proper to the practice referred to as obtaining in that Court.

But as the question is referred, I would answer the question in the negative, holding that it is necessary in such contracts as in any other contract to prove the common intention of the parties as a question of fact. In my opinion, the mere fact that the contract is a Teji contract or a Mandi contract or a Teji Mandi contract with double option makes no difference to this point. It may be that if a party desires to prove that a particular contract of that description was a wager-

ing contract, he may be able to do so with slight proof; and, under the circumstances of any particular case, it may be that the Court may be able to decide, without much outside evidence, as to whether that contract was in the nature of a wager or not.

But to my mind it is essentially a question of fact which must be answered on the evidence in each case; and the mere fact of its being Teji-Mandi contract is not by itself sufficient to take it out of the ordinary rule that the party who pleads that contract is void, as it is in the nature of a wager, has to prove that fact.

The practice is probably due to certain observations in *Jessiram Juggonath* v. *Tulsidas Damodar* (1) and in the earlier case of *Ramchandra* v. *Ganapabaisan* (2). The observations in *Jessiram's* case at p. 272 clearly show to my mind that it is really unsafe to lay down any general proposition in this matter; and whatever the opinion formed by a particular Court on the evidence in that particular case may be, the only general proposition which, in my opinion, can be safely enunciated is that the fact of the contract being a wager must be proved by the evidence in the case on the essential point whether the common intention of the contracting parties was to deal only in differences.

It is hardly necessary to refer to any authorities on this point. Having regard to the nature of these contracts, in my opinion, it is neither possible nor desirable to lay down any general rule that they must be presumed to be wagering contracts without any proof as to the common intention of the contracting parties.

There is a recent judgment of Mr. Justice Kincaid in *Manubhai* v. *Keshavji* (3) where the same view is indicated. We do not desire to express any opinion on the evidence in this case, and by answering the question referred to us, we do not mean to say anything more than this that on the evidence in the case it is for the Court to decide whether in this particular case the contracts were wagering contracts are not.

Costs to be costs in the cause and to be taxed as on the Original Side.

Crump, J.—I agree to the answer proposed to the question propounded by the Court of Small Causes The difficulty that I feel in this matter is that I do not precisely apprehend what is the point of law that is submitted to us. The question as framed is "Are agreements of Teji and Mandi necessarily to be held as wagers on account of their nature and characteristics alone or is evidence necessary to prove that the contracts were intended to be wagers?"

Now if it is to be taken that we are asked whether as a matter of law such contracts are necessarily to be held as wagers, then the answer clearly must be in the negative. For it is not even suggested that there is any rule of evidence or any other rule of law which can be held to exclude evidence as to the true nature of such contracts.

It may be that as a matter of fact it has been found in practice that a large number of these contracts are wagering contracts, but that is no ground on which any rule of law can be based. All that can be said is that there is no legal presumption that a Teji or Mandi contract is a wagering contract and that it must be dealt with as any other contract, and that the rules that have been laid down for determining whether a contract is a wagering contract or not are applicable to this case just as much as to other contracts

The test is well known. Where it is shown that a common intention of the parties was that in no case delivery was to be taken or given but that in all cases differences should be paid then the parties are wagering. It is impossible to my mind to go beyond that and it in effect furnishes the answer to the question propounded.

Answer accordingly.

(1) (1912) 37 Bom. 264 = 16 I. C. 576 = 14 Bom. L. R 617.

(2) (1910) 12 Bom. L. R. 590 = 7 I. C. 665.

(3) A. I. R. 1922 Bom. 66 = 24 Bom. L. R. 60.

A. I. R. 1922 Bombay 409

SHAH, AG. C. J, AND CRUMP, J.

In re Mahadev Ramkrishna Karkare—Applicant.

Cr. Application for Rev. No. 92 of 1922, decided on 14th June, 1922, against an order of 1st Class Magistrate, Rajapur.

Criminal P. C. S. 250 (1)a—False and vexatious complaint—Order of compensation to accused cannot be passed in complainant's absence.

An order under S. 250, Cr. P. C. awarding

compensation to the accused can be passd only after giving an opportunity to the complainant to show cause against it. It is note proper to pass such an order in his absence.

Jinnah with *Ratanlal Ranchhodlas*—for Applicant.

Shah, Ag. C. J.—In this case the Magistrate has made order under S. 250 of the Code of Criminal Procedure without giving to the complainant an opportunity of putting forward his objections to the order The reason given by the Magistrate for adopting that course is that in his view the complainant had been absenting himself on the appointed days of hearing, and as he conjectured, probably fearing that he would be called upon to pay compensation. It is difficult to understand how any inference could be drawn against the complainant from his absence. He was not bound to be present at those dates of hearing, or at any rate, on the day on which the order was made. There is nothing to show that he was bound to be present, and in fact he was absent. The Magistrate has read the proviso to subsection (1) of S. 250 as though it contained the words "if the complainant be present."

But those words are not there and it is difficult to read words in the proviso which are not there. It is clear that under the proviso, the Magistrate was bound to hear the complainant before making the order which in the present case he failed to do It appears from the judgment that the complainant's pleader was there, but he was unable to urge any objection on behalf of the complainant as he had no instructions from the complainant on the point.

Under the circumstances the presence of the pleader on that date could not be treated as dispensing with the necessity of the Magistrate's calling upon the complainant to state his objections to any order that he might propose to make under S. 250 On this ground alone the order in the present case ought to be set aside.

I, therefore, make the rule absolute and direct the amount, if paid, to be refunded to the complainant.

The accused in this case, though served has not appeared to support the order.

Crump, J.—I agree.

Rule made absolute.

A I.R. 1922 Bombay 410.

SHAH, AG. C J. AND CRUMP, J.

Mahadu Kashiba and others—Defendants-Appellants v.

Krishna Tatya Mahar and others—Plaintiffs-Respondents.

S. A. No. 568 of 1919 decided on 16th June 1922 from the decision of Asst. J., A. P Satara, in A. No 568 of 1919.

Bombay Hereditary Officers Act (Bom. Act III of 1874), S. 18—Mharki Vatan—*Panch not appointed by Collector but by Karkun—Award by such Panch is invalid—Suit, independent of award does not lie in Civil Court.*

A dispute regarding a *Mharki Vatan* was referred under S 18 to a panchayat. The parties failed to appoint the panchas, the Deputy Collector therefore directed the Mamlatdar to appoint them; the Mamlatdar ordered his Head Karkun to appoint the Panchas and appointed the Head Karkun as a Sar-Panch. The Panch thus constituted made an award, which was subsequently approved by the Deputy Collector. On the validity of the award being challenged

Held that the procedure followed was not a substantial compliance with S 18 and that the Panch so constituted could not make a valid award. The award being a nullity, a suit by the Mahar Vatandars to restrain the villagers of their village from delivering the carcasses of dead animals and paying *baluta* to the mangs, is not cognisable by a Civil Court, having regard to S. 18, 25 B 186 Foll.

[P. 412, C. 1 & 2.]

Patwardhan and *V. D. Limaye*—for Appellants.

K N. Koyajee—for Respondents No. 1 to 15

Shah, Ag C. J.—This appeal arises out of a suit brought by the Mhars of the village of Peth against the defendants. The plaintiffs relied upon an award of the Panch said to have been made under S. 18 of the Bombay Hereditary Offices Act III of 1874. That section provides that "the decision of the Panchayat or of the Collector (as provided in the section), shall be final and binding on all persons or classes whose rights, duties or liabilities have been submitted to such decision." The decisions of the lowerCourts are based upon the award which is Ex.54 in the case.

In the appeal before us on behalf of the defendants two objections have been raised as to the validity of this award. First, it is urged that the appointment in this case of certain Panchas is made by the Assistant Collector, whereas the section requires that it should be made by the Collector. Secondly, it is urged that under the section there should be five Panchas, two to be appointed by the villagers, two by the Vatandars and one Sar-Panch to be appointed by the

Collector, while the award shows that there were only four Panchas, two of whom were appointed on behalf of Government It is urged that there was no appointment of the Sar-Panch, that the Panch was not constituted as required by S. 18, and that the award is invalid.

As regard the first point it is clear that under S 10 of the Bombay Land Revenue Code the Assistant Collector in charge of the Taluka can perform all the duties and exercise all the powers conferred upon a Collector by the Bombay Land Revenue Code or any other law in force for the time being as regards that Taluka We think that the Assistant Collector was entitled to exercise the powers conferred upon the Collector by S. 18. Section 84 of the Bombay Hereditary Offices Act, which has been relied upon on behalf of the appellants as indicating an intention restricting the exercise of the powers of the Collector by the Assistant Collector, does not appear to us to justify any such suggestion.

The purpose of S. 84 seems to us to be quite different and does not indicate any intention contrary to or restrict the scope of the terms of S. 10 of the Bombay Land Revenue Code as regards the exercise of the powers of the Collector by the Assistant Collector.

As to the constitution of the Panchas, the point apparently was not raised in the lower Courts, and we gather from the arguments before us that on the present record the necessary facts bearing on the point cannot be ascertained. The award itself shows that there were two Panchas on behalf of the Mhars and there were two Panchas on behalf of the Government.

It is quite possible that under S. 18 the two Panchas to be appointed by the villagers may be appointed by the Collector if the villagers fail to nominate them within the time prescribed under the section. But we do not know how the two Panchas on behalf of Government came to be appointed. As regards the appointment of the Sar-Panch the award does not show, and we do not know, whether any Sar-Panch was appointed. Before expressing any opinion as to the validity of the award it is necessary to know the facts relating to the constitution of the Panchas in this case.

We, therefore, send down the following issues for findings by the lower appellate Court:—

(1) Were the Panchas and the Sar-Panch appointed in this case as required by S. 18 of the Hereditary Offices Act?

(2) Whether the award, Ex. 54, is valid?

The parties to be at liberty to adduce evidence bearing on these issues.

The findings to be returned in three months.

As the point as to the validity of the award was not raised in the lower appellate Court, we have thought it desirable not only to have the facts relating to the constitution of the Panch determined, but to have a distinct finding on the question by the lower appellate Court.

(On return of the finding the following judgments were delivered.)

Crump, J.—By our interlocutory judgment of June 22, 1920, we sent down two issues for determination and we are now in possession of the findings of the lower Court upon those two issues and of the materials upon which those findings are based. The first issue was "were the Panchas and the Sar Panch appointed in this case as required by S 18 of the Hereditary Offices Act," and upon the facts stated in the judgment of the lower appellate Court upon remand, I think that this question must be answered in the negative.

Section 18 of the Bombay Hereditary Offices Act lays down the procedure to be followed in determining the rights and duties of certain classes of Vatandars, and it is necessary before the determination can be said to have been made under that section that the provisions of that section should have been complied with at least in substance.

Now what the section requires is that the Collector, if he takes action under that section, shall cause the matter in dispute to be defined in writing by a Panchayat of five persons, whereof two shall be appointed by the villagers, two by the Vatandars, and one who shall be Sarpanch by the Collector. That section further goes on to provide that in case

the villagers or the Vatandars fail to nominate members within seven days, the Collector shall appoint such members as may be required to constitute a Panchayat of five.

It may be premised that the Deputy Collector who dealt with his matter had no doubt the powers of the Collector as explained in our previous judgment. It is clear, however, that the Legislature intends that the Collector shall himself appoint the Panchas in case the villagers or Vatandars fail to nominate members within seven days and also that the Sarpanch shall be appointed by him.

Now what happened in this case was that on August 1, 1911, a petition was made to the Deputy Collector by the Mhars and on November 3, 1911, the Mamlatdar wrote to the Deputy Collector soliciting the appointment of a Panch according to S. 18 of the Bombay Hereditary Offices Act. Had the Deputy Collector proceeded to cause the appointment of a Panch to be made in the manner required by the section, all subsequent difficulties in the case would have been saved. But what he did was to write to the Mamlatdar directing him himself to take action in accordance with the suggestion made by him.

From that time onwards he was in no way concerned in the matter. What appears to have happened afterwards is this. The Mamlatdar ordered his Head Karkun to get two Panchas appointed by each party and appointed the Head Karkun to be himself a Sar-panch. The Head Karkun then reported to the Mamlatdar that the Mhars had appointed Panchas but that villagers had refused to do so. Thereupon the Mamlatdar ordered the Head Karkun to appoint the necessary two persons under S. 18. It thus appears that the Sar-panch was not appointed by the Deputy Collector but by the Mamlatdar and that the two Panchas whose appointment became necessary owing to the failure of the villagers were not appointed by the Mamlatdar, still less by the Deputy Collector but by the Head Karkun.

We are unable to consider that the action here disclosed was a substantial compliance with S. 18 of the Bombay Hereditary Offices Act, or that a Panch so constituted could make a valid award. The fact that after the award was made the Deputy Collector approved the action taken and the finding of the Panch can give no kind of validity to that which had no validity at the time at which it is was done. The approval of the Collector is not required by the Act in the case where the Panchas come to a decision. It is only where the Panchas fail to come to a decision that this approval is necessary and therefore the Deputy Collector's order cannot be considered as having been made in accordance with the proviso to the section.

It follows that the award is invalid, in fact it is a nullity, not having been made in any respect whatever in accordance with the requirements of the legislature. Therefore the result must be that the case must be approached as though there was no such award.

Now what is the result? The suit was one by the Mhars to restrain the villagers from giving the carcasses of dead animals to the Mangs in contravention of the award which was thus passed and if the award was a nullity it must of necessity fail. It was however suggested that, apart from the award, the question of the rights of the Mhars arises to be decided on the merits.

But it has been held by this Court in *Bhiva* v. *Vithya* (1) following the decision in *Parsha* v. *Lagmya* (2) that a Civil Court has no jurisdiction to determine a matter of this kind having regard to S. 18 of the Bombay Hereditary Offices Act which provides the procedure whereby such disputes are to be determined. Following those decisions there is no other course possible except to allow the appeal and to dismiss the suit.

In view of the fact that this point was not raised until the case came before us in second appeal, we direct that the parties should bear their own costs throughout.

We wish to add that we regret the result in this case and that we trust that if the Mhar-plaintiffs move the Collector for a fresh decision under S. 18 of the Act, steps may be taken to ensure a speedy determination of the

(1) (1900) 25 Bom. 186=2 Bom. L. R. 869.

(2) (1888) 13 Bom. 83.

matter and that attention may be paid to the requirements of the Statute in order that so regrettable a result may not again occur.

Shah, Ag. C.J.—I agree.

Appeal allowed.

A.I.R. 1922 Bombay 413

MACLEOD, C.J. AND COYAJEE, J.

Ishrappa Ganappa Hegde—Plaintiff—Appellant.

v.

Krishna Putta Shankar Hegde and others—Defts.—Respondents.

S. A. No 380 of 1920 decided on 31st January 1922 from the decision of D. J. Kanara, in A. No. 82 of 1919.

Hindu Law—Partition—Sale of his undivided share in a particular item by a co-parcener—Alienation of the whole item by manager to another—Suit for partition of the particular item between strangers, without suing for general partition is not tenable.

The purchaser of an unascertained share (in a joint family property) cannot insist upon the possession of any definite piece of property. The remedy of the purchaser lies in a suit to have that share and interest ascertained by instituting a suit for general partition in which the whole of the joint family property should be included and all necessary parties joined. (*Pandu Vithoji* v. *Goma Ramji* 43 B. 472). In a suit of that nature the Court in making the partition would endeavour to give effect to the alienation and so to marshal the family property amongst the co-parceners as to allot that portion of the family estate, or so much of it as may be just to the purchaser". (11 B. H. C. R. 76.) When however, it has been proved that the whole of the family interest in the property has been disposed of by joint action between the members of the family or by separate action against which no dispute has been raised, then an action for partition between strangers in respect of a particular item may be allowed in the plainest of cases.

[P. 413, C. 2, P. 414 C. 2.]

G. P. Murdeshwar—for Appellant.

Nilkanth Atmaram—for Respondent.

Macleod, C. J.:—The plaintiff sued for a partition of the plaint strip of land and separation of his two-thirds share claiming title under a sale by defendants Nos. 3 and 4 of their two-thirds interest to the plaintiff in the suit property. Defendants Nos. 3 and 4 were members of a joint family consisting of themselves together with defendants Nos. 2 and 5, who were jointly interested to the extent of one-third. After the sale by defendants Nos 3 and 4 to the plaintiff, the second defendant as manager of the family sold the plaint strip to the first defendant.

In the trial Court the first defendant endeavoured to prove that there had been a sale to him of the plaint strip by defendant No. 2 prior to the date of the sale to the plaintiff of two-thirds of the property by defendants Nos. 3 and 4. This issue was found against him.

Then the first defendant claimed that defendants Nos. 3 and 4 were estopped from selling the plaint strip or an interest therein to the plaintiff, and that issue was found in the trial Court in the affirmative, and the suit was dismissed, on the ground that the plaintiff's suit for partition for specific property could not lie without suing for a general partition.

In appeal the learned appellate Judge considered that the suit could lie. The first defendant claimed to have purchased the interest of the whole undivided family.

"The plaintiff so far agreed with him to say that he had purchased all that remained of the joint family interest after the plaintiff's own purchase had taken effect. It was therefore common ground that the joint family had been altogether ousted. The contest was between two strangers. There was no reason why such strangers could not without instituting a general suit for partition of the entire family property maintain an action for the partition of the fraction which was in dispute between them."

Now there may be cases in which one co-parcener purports to convey his interest in a particular item of family property to a stranger, while the other coparcener (taking the simplest case of two co-parceners) sells his interest in the same property to another stranger. In such a case a suit might lie by one stranger against the other for partition for that item of the family property which had been wholly disposed of by the persons who were entitled to it.

But such an action between strangers, in my opinion should only be allowed in the very plainest of cases, when it has been proved that the whole of the family interest in the property has been disposed of either by joint action between the members of the family or by separate action against which no dispute has been raised.

In this case the first defendant claims to be entitled to the entire strip

of land in dispute under his sale from the second defendant who appears to have sold as manager; and assuming that this plaint strip had entirely gone out of the family still the question might arise whether the first defendant was entitled to the whole or only to the share of his vendor.

That question has never been raised in the suit. Accordingly there is no evidence to show that the alienation by the second defendant of the whole strip was competent.

The learned appellate Judge, however, although he considered that the suit would lie, dismissed it on the ground that the third and fourth defendants were estopped by their conduct in disputing the sale effected by the second defendant. I do not think the ground on which that estoppel was found to be effective will stand the light of analysis.

But apart from that, it seems to me that the plaintiff's suit was not competent. It is true that all the members of the joint family are parties to the suit. But the question whether the suit could be converted into a general suit for partition has never been raised, and it is much better that the plaintiff, if he wishes to proceed further, should file a general partition action, rather than confuse the issues by changing the nature of the present suit.

The dealings by members of a joint family with their undivided shares either in the whole of the family property, or in particular items, necessarily lead to a considerable amount of confusion. It cannot be said that any co-parcener has a particular share in any item of the family property. He has only an undivided share in the whole of it, and although it may be taken as settled law now that a co-parcener can sell his own interest in the joint family property, the relief given to the purchaser by the Courts can only be given by way of a suit for a general partition. See *Pandu Vithoji* v. *Goma Ramji* (1) Again in *Hanmandas* v. *Velabhdas*, (2) defendants Nos. 1 to 4 became purchasers at a Court sale in execution of the decree against the fifth defendant of two of the properties belonging to the joint family.

The plaintiff, a minor, thereupon, brought a suit against his father (defendant No. 5) and the decree holders as well as the auction-purchasers for a declaration that the plaintiff's half share in two properties did not pass to the auction-purchasers, and for possession of his half share on equitable partition. It was held that the son's interest did not pass to the purchasers at the Court sale; and it was also held that the auction-purchasers should be allowed to file a suit against the plaintiff for a general partition of the entire family properties.

The result must be that the plaintiff's suit as purchaser from defendants Nos. 3 and 4 for partition of this particular item of family property cannot lie, and we think that the order dismissing the plaintiff's suit should be confirmed, expressing our opinion that there is nothing to prevent the plaintiff from endeavouring to get advantage of his sale from defendants Nos. 3 and 4 by filing a suit for a general partition.

Coyajee, J.—I agree in holding that the plaintiff in this case is not entitled to demand by partition his vendors' alleged two-third share in this particular item of joint family property. It is clear on the facts that the plaintiff's vendors are only two out of four co-parceners owning considerable undivided property. As such co-parceners they are not entitled to say that they have a right to a specific share in any particular portion of the joint family estate. And a purchaser of their unascertained share cannot insist upon the possession of any definite piece of property.

The remedy of the purchaser lies in a suit to have that share and interest ascertained by instituting a suit for general partition in which the whole of the joint family property should be included, and all necessary parties joined; *Pandu Vithoji* v. *Goma Ramji* (1). In a suit of that nature the Court in making the partition, would endeavour to give effect to the alienation, and "so to marshal the family property amongst the co-parceners as to allot that portion of the family estate, or so much of it as may be just" to the purchaser: *Udaram* v. *Ranu* (3).

Decree confirmed.

(1) (1919) 43 Bom. 472=21 Bom.L. R. 213=50 I. C. 765.

(2) (1918) 43 Bom. 17=20 Bom. L. R. 472=46 I. C. 133.

(3) (1874) 11 B. H. C. 76.

A I. R. 1922 Bombay 415.

MACLEOD, C. J. AND COYAJEE, J.

Hallappa Kallappa—Defendant-Appellant:

v.

Irarpa Girimallappa and another—Plaintiffs-Respondents.

S. A. No. 741 of 1920 decided on 16th January 1922 from the decision of Asst. J., Belgaum, in A. No. 122 of 1918.

(a) *Dekkhan Agriculturists' Relief Act (1879), s. 10 A—Scope.*

Section 10 A of the Dekkhan Agriculturists' Relief Act applies to every suit where an agriculturist is a party and where the transaction in issue entered into by such agriculturist is of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part, under Chapter III of the Act. The section is not restricted to suits of the nature mentioned in S. 3, Cls. (*w*), (*y*) or (*z*).

[P 415, C. 2.]

(b) *Interpretation of Statutes—Illustrations in statute.*

Illustrations given in the Statute are of relevance and value in the construction of the text A I. R. 1916 P. C. 241=43 I. A 256. (P C) Foll. [P. 416, C. 2]

A. G. Desai—for Appellant.

H B. Gumaste—for Respondents Nos. 1 and 2.

Macleod, C. J.:—The plaintiff filed this suit for partition of certain lands and houses and moveables at Shirhatti in Athni Taluka. Defendants Nos 1 to 3 were his *bhaubands*. The other defendants were alleged to be alienees of some of the lands. Defendant No. 4 did not appear at the trial. The suit was decreed. Thereafter defendant No. 4 got the decree set aside to the extent of the land Survey Number 156, which is said to have been transferred to him by the sale-deed Exhibit 115 in 1913. The plaintiff alleged that the transfer was really a mortgage and that therefore the land was still owned by his family and was partible.

In the trial Court the issue was whether the sale relied on by the defendant No. 4 was really a mortgage. It does not seem to have been suggested there that that issue could not be tried or that S 10 A of the Dekkhan Agriculturists' Relief Act was not applicable to the case. But in first appeal that point was taken. The learned Judge said:

"The only question is whether the words whenever it is urged at any stage of any suit or proceeding' in section 10 A are to be so construed as to confine the meaning of the words 'any suit or proceedings' specifically to a suit of the description mentioned in S. 3, clauses (*w*), (*y*), and (*z*). Section 12 and Section 13 are in terms restricted to those suits, but section 10 A enacted in the same Chapter provides for 'any suit or proceeding.' All that is necessary is that the transaction in issue should be of such a nature as to make it amenable to the operation of Sections 12 and 13.

I see no reason for cutting down the scope of the words 'any suit or proceeding' in Section 10 A and limiting it to the four corners of the suits provided for in Section 12. Section 10 A was, it would appear, deliberately given a wider scope. The words 'any suit' have therefore to be read in their ordinary sense."

It seems to me that when the provisions of S 12 were specifically limited to any suit of the description mentioned in S. 3, clauses (*w*), (*y*) or (*z*), if it had been intended to limit the provisions of S. 10 A to suits of that description, similar words would have been used instead of the words "in any suit or proceeding." But for the section to be applicable it is only necessary that an agriculturist must be a party to the suit, and that some transaction shall be in issue entered into by such agriculturist or the person, if any, through whom he claims, which shall be of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under Chapter III of the Act.

The illustration (*a*) makes this clear:— If a landlord sues for possession of land leased by him to an agriculturist, such suit is not one of the suits referred to in S. 3, (*w*), (*y*) and (*z*). In a suit on a lease, if the defendant alleges that he mortgaged the land with possession to the lessor, who is entitled to its possession only as such mortgagee and not as owner, and asks that he may be allowed to redeem the mortgage without being ejected then, there is a transaction in issue such as is referred to in S. 10 A and the Court may admit evidence on this allegation, and if satisfied that it is correct may decline to eject the defendant as tenant, and allow the suit to be converted into one for redemption of the mortgaged property.

Therefore the fact that there is some such transaction in issue in a suit to which

an agriculturist is a party renders S. 10 A applicable whatever the nature of the suit may be. Now it seems to me to be clear that this was a suit for partition which was resisted by the fourth defendant on the ground that a part of the property had been sold to him, so the Court was entitled to take evidence with regard to the real nature of the transaction, and decide whether or not, the transaction was a sale as contended for by the fourth defendant, or a mortgage as alleged by the plaintiff, and having found that it was not a sale but a mortgage, then the Court was entitled to treat the case as against the fourth defendant as a suit for redemption.

The Court apparently did not take that course but left the mortgagee-appellant to his remedy by another suit. As the parties are agreeable now that we should pass orders as if the plaintiff was asking for a redemption of the mortgage from the fourth defendant, while dismissing the appeal by the fourth defendant against the decree for partition we direct that the suit should be remanded to the trial Court for taking an account under S. 15 B of the Dekkhan Agriculturists' Relief Act, of the mortgage Exhibit 115 of the year 1913. We dismiss the appeal with costs and remand the suit to the trial Court to pass a redemption decree. Costs in remand to be costs in the cause.

Coyajee, J.—I agree. In this second appeal it is urged on behalf of the appellant that the lower Courts erred in law in inquiring into the nature and character of the transaction in question. The contention is that the operation of S. 10 A of the Dekkhan Agriculturists' Relief Act should be confined to that limited class of suits which is described in S. 3 of the Act whereas the present suit being a suit for partition of certain properties does not fall within that class.

In my opinion that contention is not well-founded. The material words of the section are: "at any stage of any suit or proceeding to which an agriculturist is a party." These words must be given their ordinary and natural meaning, and the Legislature must be intended to mean what it plainly expresses. The illustrations attached to that section show that it was intended to give full effect to the plain words of the enactment. Neither of the suits referred to in illustrations (*a*) and (*o*) falls within the restricted class of suits described in S. 3. The illustrations given in the statute "are of relevance and value in the construction of the text."

In *Mahomed Syedol Ariffin* v. *Yeoh Goi Gark* (1), the Privy Council observes: "It would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired."

Moreover, a comparison of the language used in Ss. 10 A 11 and 12, which all occur in the third Chapter of the Act, yields the same result. For, whereas the words used in S 10 A are "any suit or proceeding to which an agriculturist is a party," those used in Ss. 11 and 12 are "suit of the description mentioned in Section 3." That this variation of language is not attributable to a desire of improving the style or of avoiding repeated use of the same words, becomes obvious on a mere reading of Ss. 11 and 12 themselves.

In my opinion, therefore, S. 10 A has a wider operation than what is contended for on behalf of the appellants; and this construction best harmonizes with the object which the Legislature had in view in passing the enactment.

Appeal dismissed and case remanded.

(1) A. I. R. 1916 P. C. 242=43 I. A. 256, 263=19 Bom. L. R. 157=(1916) 2 A. C. 575=21 C. W. N. 257=(1917) M. W. N. 162 (P.C.)

A. I. R. 1922 Bombay 416.

MACLEOD, C. J. AND SHAH, J.

East Indian Railway Company—Defendant-Appellant

v.

Dayabhai Vanmalidas—Plaintiff-Respondent.

S. A. No. 329 of 1921, decided on 23rd March 1922, from the decision of Asst J., Ahmedabad in A. 184 of 1918.

(a) *Railways Act, S. 75, Schedule II—Shawls—Means a shawl of special value as understood in India.*

The term "Shawls" means "an article of dress worn by orientals consisting of an oblong piece of material manufactured in Kashmere from the hair of the Tibetan "Shawl-Goat." It has been used in a limited and special sense, namely as an article of special value

[P. 419, C. 2. & 420, C. 1.]

(b) *Interpretation of Statutes—Language—Context to be looked into.*

When a word has two meanings one of a restrictive nature and the other of a comprehensive character and when we have to decide which of the two meanings would be appropriate, it seems necessary to turn not only to the context in relation to which the word is used but also to the scope and object of the section and to the reason of the rule contained therein. 39 Cal. 1029 F-42 All. 76 N F.

[P. 419, C. 2]

(c) *Civil P. C. S. 100—Meaning of word.*

Whether a word is used in a restricted sense is a point of law. [P 417, C. 2, P. 419, C. 1]

Campbell—for Appellant.

G. N. Thakor—for Respondent.

Macleod, C.J.—This is an appeal from the decree of the Assistant Judge of Ahmedabad confirming the decree passed against the original first defendant by the First Class Sub-Judge.

The plaintiff sued the East Indian Railway Company and the Bombay Baroda and Central India Railway Company to recover Rs. 877-11-7 the value of a bale of goods known as Malidas of German make which was consigned in October 1915 by the plaintiff's agent from Howrah to Ahmedabad, and lost in transit.

The first defendant company relying on the fact that the plaintiff in his letter of the 23rd December 1915 described the goods in the bale as 170 pieces Shawls, contended that they came within the excepted articles referred to in S. 75 of Act IX of 1890 and as the consignor had failed to describe the nature of the goods and pay the proper rate for them, the company was not liable.

The evidence shows that the goods were described as Malidas in the plaintiff's account books, and that each piece was worth Rs. 5-5-0. The Subordinate Judge, relying on the decision in *Surat Chandra* v. *Secy. of State* (1), held that the term 'Shawls' in the Second Schedule to the Indian Railways Act did not apply to these cheap goods which were not even manufactured when the Act of 1854 was passed, and so S. 75 did not apply.

The term "Shawls" in the Schedule was meant to apply to valuable Shawls from Kashmir and other places. Accordingly the suit was decreed against the first defendant company and dismissed as against the second defendant company but without costs. In appeal the Assistant Judge said:

"The accounts of plaintiff and his agent show that the goods consigned were Malidas and not Shawls. The goods do not fall under S. 75, Schedule II. There is ample other evidence to support the same conclusion. The construction of the law is not favourable to defendant according to decided cases considering the price and the quality of goods.

We have had before us a specimen of the goods contained in the missing bale. It is obviously a Shawl within the ordinary meaning of the word as used in the English language.

It was argued that both Courts had found as a question of fact that the goods were not Shawls and that being so no second appeal lay.

Exactly the same question arose in *Surat Chandra* v *Secy. of State* (1) which was a second appeal and the Court considered that the real question at issue was whether the word "Shawls" in the Second Schedule of the Indian Railways Act was meant to apply to all Shawls, or only Shawls of a particular material and value, and not whether 'Alwans' were or were not Shawls. The term 'Shawls' would appear at first sight to be used generally as applicable to all Shawls, but it is a question of law whether in its particular context it was not used in a restricted sense.

Now the object of S. 75 was to protect the Railway Companies from claims made in respect of loss or damage to articles of a special value, unless the nature of such articles had been previously declared and a special rate paid for the carriage thereof. The words "special value" are misleading as many of the articles detailed in the Second Schedule have no special value and protection was really necessary on account of their special nature, so that the Railway Companies might be put on notice to take precautions to ensure their safe transit.

Some of the articles enumerated can be of great value within a small compass, others though large can be easily damaged. There is no general principle applicable to all except that they require special care by the Railway Company when performing the contract of carri-

(1) (1912) 39 Cal. 1029=14 I. C. 726.

age. An half anna postage stamp, a double bass, a diamond, a watch must all be declared provided that value of the package is over 100 rupees, so that the intrinsic value is no test.

The plaintiff, therefore, must rest his case on the contention that the word "Shawls" in the Second Schedule must mean Shawls of a particular kind. It was suggested that when the word was used in the first Indian Railways Act of 1854, only Indian Shawls could have been referred to, and that the only Indian Shawls known in those days were valuable Kashmir or Persian Shawls. That is no doubt correct as Shawls are mentioned among the articles of special value in the corresponding section of the Carriers Act of 1830.

It was unfortunate when the Indian Railways Act of 1890 was passed that it was not recognised, that all kinds of imported Shawls, whether valuable or of a cheaper quality, might be given to the Railway Companies for carriage, so that the retaining of the general term "Shawls" in the Second Schedule might lead to a demand by the Railway Companies that such Shawls should be declared. Though at one time I was of opinion that a great deal could be said to justify that demand, and that the obvious way to remove the difficulties which arise in cases like the present one was to amend the Second Schedule so as to make it clear that only valuable Indian Shawls were intended to be included therein, I am not prepared to differ from the view taken by my brother Shah which is in accordance with the decision in *Sarat Chandra Bose's case* (1) and opposed to the view of Stuart, J. in *Sudarshan Maharaj* v. *E. I. Ry. Co.* (2).

It cannot be denied that this case of cheap imported Shawls is much like any other case of woollen goods, and it would not naturally occur to the consignor that it would have to be declared, in order that, if lost, its value might be recovered It would be certainly desirable that the term "Shawls" in the Second Schedule should now be amended so as to make it clear that only Shawls of special value are intended to require to be declared. I should think it would then be difficult for the Railway Companies to make out any good grounds for including Malidas in the Schedule.

I think both appeals should be dismissed with costs.

Shah, J :—The only question in this second appeal is whether the piecegoods contained in the missing parcel were 'Shawls' within the meaning of Schedule II of the Indian Railways Act IX of 1890.

The importance of the question is that if the parcel contained 'Shawls' the Railway Company would not be liable for the loss, as the declaration required by S. 75 of the Indian Railways Act was not made by the consignor. On the other hand if the goods were not 'Shawls' the company would be liable for the loss of the goods delivered for carriage under S. 72. of the Indian Railways Act.

The lower Courts have held that the articles contained in the parcel of which a sample has been produced in the case, were not 'Shawls'.

It has been urged on behalf of the appellant company that the word 'Shawls' is used in a general and wide sense, and that it includes oblong pieces of any material which can be used as 'Shawls' though cheap and not satisfying the requirement of the word 'Shawl' in a restricted sense as used and understood in India. The dictionary meaning of the word as understood in the English language is relied upon as indicating the sense in which the word is used in the Schedule. The appellant relies upon the observations in *Sudarshan Maharaj* v *E. I. Ry. Co.* (2) and contends that the view taken in *Sarat Chandra* v. *Secy of State* (1) of the meaning of the word 'Shawls' is erroneous.

On behalf of the respondent it is urged, that it is really a question of fact and that the finding of the lower appellate Court based on the evidence in the case that the sample before the Court is not a 'Shawl' within the meaning of the Schedule ought to be accepted in second appeal. It is further urged that in view of the scope and object of S. 75, the restricted meaning of the word 'Shawl' should be accepted. The respondent relies upon the decision in *Sarat Chandra Bose's case*. (1).

(2) (1919) 42 All. 76=52 I. C. 644 =17 A.L.J. 1031.

After a careful consideration of the arguments on both sides, I have come to the conclusion that the question set forth at the outset should be answered in the negative.

It is in a sense a question of fact whether the particular sample before the Court is a 'Shawl' or not But in the present case the answer depends upon the meaning of the word 'Shawl.' If the word is interpreted in a restricted sense the article in question would not be a 'Shawl.' If it be interpreted in the wider and more comprehensive sense, it would be a 'Shawl.'

Under the circumstances it seems to me that it cannot be treated as a pure question of fact and that it is necessary for us to consider in second appeal as to what is the proper meaning of the word 'Shawl' as used in Schedule II.

The sample in question is an oblong piece worth Rs. 5-5-0 probably made of rough wool or of mixed material of wool and cotton It appears to be an imitation of a real Shawl with the marked difference in the price as well as the material of which it is made. The word 'Shawl' is the same as the Persian word 'Shawl' and it is commonly used in the same sense in almost all the Indian languages. It is used by the Indian Legislature in an Act applicable to British India. The language of the Act is English. The meaning of the word in Johnson's Persian Dictionary is given as follows:—

"A Shawl or mantle, made of very fine wool of a species of goat common in Tibet. A coarse mantle of wool and goats' hair, worn by dervishes."

The meaning of the word in English is thus stated in Webster's Dictionary:—

"A square or oblong cloth of wool, cotton, silk or other textile or netted fabric used especially by women as a loose covering for the neck and shoulders: Indian Shawl is described as a kind of rich Shawl made in India from the wool of the Cashmere goat. It is woven in pieces which are sewed together."

The word is more fully dealt with in Murray's Dictionary and I shall quote only two meanings of the word as given there which are material for the present purpose:—

(1) "An article of dress worn by Orientals commonly as a scarf, turban, or girdle, consisting of an oblong piece of a material manufactured in Kashmere from the hair of the Tibetan 'Shawlgoat'."

(2) "As the name of an article of clothing worn in Europe and the West, chiefly by women as a covering for the shoulders or, sometimes for the head, originally applied to the imported Kashmere Shawl' but in later use extended to denote an oblong or square piece of any textile or netted fabric, whether of wool, silk, cotton or mixture of these."

It would appear that in Persian as well as in the Indian languages the word has a limited and specific meaning which would exclude the sample such as we have in the present case from its scope. The Indian Legislature, however, has used the word in an Act in the English language. Though it is not improbable that it may have been used by the Legislature as an Indian word in the sense given to it in the Indian language, we have to see what its meaning is in the English language. The first meaning as given in Murray's Dictionary in substance is the same as that in the Indian languages. The second meaning as given above is much wider and would include in its scope any oblong piece of cloth made of silk, wool, cotton or mixture thereof.

When the word has two meanings, one of a restrictive nature and the other of a comprehensive character, and when we have to decide which of the two meanings would be appropriate, it seems to me that it is necessary to turn not only to the context in relation to which the word is used but also to the scope and object of S. 75 and to the reason of the rule contained therein. I think it is open to the Court to consider these elements in deciding which of the two meanings is to be accepted as representing the true meaning of the word used in the Schedule.

The section is enacted to lay down certain conditions as to articles of special value which must be fulfilled before any liability can be attached to a Railway Administration for the loss thereof. The general

responsibility of the Railway Administration in respect of the goods delivered for carriage is defined by S. 72; and S. 75 contains an exceptional rule applicable to certain articles of special value mentioned in the Second Schedule.

It is clear to my mind that 'Shawls' in the comprehensive sense given thereto in the English language would not necessarily be an article of special value. A Shawl in restricted sense is clearly an article of special value. It makes no difference to my mind as to how or where the article is manufactured. But what does matter, to my mind, is the stuff of which it is made. The price of the article would not directly matter: but it would be relevant as indicating the real nature of the material used. The reason of the rule contained in S. 75 can apply to 'Shawls' in the restricted sense and not to Shawls in the comprehensive sense of the term.

I, therefore, draw the inference, and I think it is an inference open to the Court to draw in view of the origin and use of the word as also its apparent ambiguity in relation to the context, that the word 'Shawls' is used there in the restricted sense as indicated in Murray's Dictionary.

It is clear that the article in question does not satisfy that description, and that the conclusion reached by the lower Courts that the missing parcel did not contain 'Shawls,' is right.

It is not necessary to express any opinion as to whether 'Alwans' and 'Malidas' can be 'Shawls' in this restricted sense. In order to be able to decide this question, I should like to know more about the meanings attached to these words by the dealers in different markets than it is possible to know on the present record.

Taking the dictionary meanings of these terms in Urdu 'Alwans' and 'Malidas' may be Shawls in the proper sense of the word. I do not think, and it is not contended that the use of the word 'Malidas' by the plaintiff in his accounts and of the word 'Shawls' in the correspondence can affect the conclusion that the article in question is not a 'Shawl.

I have considered the observations of Stuart J. in *Sudarshan Maharaj* v. *E. I. R. Co.* (2). The actual decision in that case has no bearing upon the point arising in this case. It may not matter whether a particular Shawl is a machine-made or hand-made article. The learned Judge in that case had to decide whether the word 'lace' as used in the Schedule included machinemade lace also.

The observations of the learned Judge on the decision of the Calcutta High Court in *Sarat Chandra* v *Secy. of State* (1) as to the meaning of the word 'Shawls' were not strictly speaking necessary for the decision in that case; and while I agree that the Court has to consider the meaning of the word used by the Legislature and not to look to the discussions and views of the legislative authorities, I do not think that the Court is absolved from the duty of determining which of the two meanings, which the word may bear, is to be accepted. The origin of the word 'lace' is different.

In my opinion different considerations arise in determining the true meaning of 'Shawls' as used in the Schedule. There may or may not be any ambiguity about the meaning of the word 'lace' but it does not follow that there is no ambiguity about the meaning of the word 'Shawls'. Where the question is whether the word 'Shawl'—a word of Indian origin and of extensive use in India as an Indian word—has one meaning or the other the considerations to which I have referred naturally arise. On the whole I am satisfied that the conclusion reached in *Sarat Chandra Bose's case* (1) as to the meaning of the word 'Shawls' is right.

I would therefore, confirm the decree of the lower appellate Court and dismiss the appeal with costs.

In the view I take of Second Appeal No. 321 I think that the Second Appeal No. 363 should also be dismissed with costs. It relates only to the order of costs in the trial Court: and I see no good reason to disturb that order.

Appeal dismissed.

A. I. R. 1922 Bombay 420

MACLEOD, C. J. AND SHAH, J.

Rajeppa Ranappa Kundagol.—Plaintiff—Appellant.

v.

Gangappa Jotuppa Mandwe.—Defendant—Respondent

S. A. No. 483 of 1921, decided on 10th April 1922 from the decision of D. J., Dharwar, in A. No. 232 of 1919.

Hindu Law—Succession—Bandhus—Mother's sister's son and Mother's brother's son are both entitled to succeed equally under the Bombay School.

In the Bombay Presidency between mother's sister's son and mother's brother's son, there is no substantial ground for ranking one above the other the nearness of affinity of both being the same. As both are equally distant from propositus, they ought to take equally.

[P. 422, C 1. P. 423, C. 2.]

R. A. Jahagirdar.—for Appellant.

Y. N Nadkarni for *K. H. Kelkar.*—for Respondent.

Shah, J—The question of law arising in this appeal is as to how the property of a Hindu would devolve when the nearest relations of the deceased are his mother's sister's son, and mother's brother's son.

The facts are not in dispute. Nagappa was the last male holder and the adopted son of Jivappa. On his death the property devolved on his adoptive mother Pirava. She alienated the property in suit to her brother's son who is defendant No. 1 She died, and thereafter defendant No. 2, who is found to be her sister's son sold the property to the plaintiff. On Pirava's death the inheritance is to be traced to Nagappa. The plaintiff claims through the adoptive mother's sister's son: and defendant No. 1 claims as the mother's brother's son. The alienation by Pirava ceased to be operative on her death.

The trial Court held that the mother's sister's son was the preferential heir, and decreed the plaintiff's claim. The lower appellate Court held that the mother's brother's son was the preferential heir and accordingly dismissed the plaintiff's suit with costs.

In the appeal before us the same question arises, and we have to decide as to what are the rights of the competing heirs to the inheritance of Nagappa.

The view of the trial Court is in accordance with the decision of the High Court of Madras in *Appandai Vathiyar* v. *Bagubali Muduliyar* (1); and the view of the appellate Court is supported by the decision of the Allahabad High Court in *Ram Saran Lal* v. *Rahim Baksh* (2). There is no decision of this Court on the point. The only decision to which a reference may be made is the case of *Mohandas* v. *Krishnabai* (3) in which the mother's brother (an Atmabandhu not expressly mentioned) was preferred to the mother's sister's son (an Atmabandhu expressly mentioned) on the ground of propinquity.

Here we have to consider the claims of the mother's sister's son and the mother's brother's son. Both are males, both are Atmabandhus expressly mentioned in the Mitakshara and the Vyavahara Mayukha, both are equally removed from the propositus and they are both related on the mother's side.

Considering the point with reference to the texts exclusively apart from the decisions, it is clear from the Mitakshara Ch. II, Section VI, placita 1 and 2 (Stokes' Hindu Law Books, p. 448) that both are Atmabandhus, and there is nothing to guide us beyond this that "by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance; on failure of them his father's cognate kindred or if there be none his mother's kindred."

The only ground for determining the preference of one Bandhu over the other is near affinity, or propinquity, the word in the text for it being *antarangatva*. It is now settled beyond controversy that the lists of Bandhus are merely illustrative and not exhaustive and that nothing is laid down by Vijnanesvara beyond this that Atmabandhus are to be preferred to Pitribandhus and that Pitribandhus are to be preferred to the Matribandhus, and that the reason of the preference is propinquity.

In the Vyavahara Mayukha also we find the same thing, and nothing more. (See Mandlik's Hindu Law, p. 82). After referring to the Smriti texts, specifying the different classes of Bandhus, which have been quoted by Vijnanesvara in the Mitakshara, the author of the Mayukha says that the order (of succession) is as stated in the text. I have given the English trans-

(1) (1910) 33 Mad. 459=(1910) M. W. N. 44=7 M. L. T. 203=5 I. C. 280=20 M. L. J. 275.

(2) (1916) 38 All. 416=34 I. C. 108 =14 A. L. J. 538.

(3) (1881) 5 Bom. 597.

lation of this passage as rendered by Mr. Mandlik, who has added a footnote expressing his opinion that the order must be taken to have been specified in the texts even as regards each class of Bandhus.

Apart from the argument based on this note, there is nothing in the Vyavahara Mayukha which throws any further light on the point now under consideration. It is not necessary to refer to other works on Hindu law. It is enough to point out that there is nothing in the texts or the commentaries which are accepted as authorities in this Presidency to show that any test for determining the question of preference among Bandhus of the same class other than that of propinquity is laid down.

All other considerations to be found in modern books on Hindu law are useful in determining the nearness of affinity: but there is no express reference thereto to be found in the texts, the only test mentioned being propinquity. Speaking with reference to this Presidency I think that the only test that has been applied, and that ought to be applied, is propinquity to the deceased. Applying that test to the facts of this case without reference to any other consideration it seems to me that both are equally removed from the propositus.

It is urged, however, that when that is the case, considerations of the relative religious efficacy of the oblations offered by these relations ought to be considered. Both the Madras and Allahabad High Courts have rejected the argument of relative religious efficacy in the case of these two Bandhus. It is held that it affords no safe basis for preferring one to the other.

I do not consider it necessary to deal with this argument at length. In this Presidency the test has not been accepted as sound in the case of distant relations—like Bandhus. Its application is apt to lead to confusion: also the test when applied to the case of the two Bandhus that we are concerned with, fails to yield any such result as would justify the preference of one over the other. It is enough to state that on this point I accept the view of the Madras and Allahabad High Courts.

It is next urged that on the ground stated in the foot-note in Mr. Mandlik's book on Hindu Law to which I have already referred, the mother's sister's son should be preferred to the mother's brother's son as having been mentioned first. Though there is no express reference to this foot-note in the judgment in *Mohandas* v. *Krishnabai* (3) it appears that as far back as 1881 the opinion was expressed with reference to the words used by Nilakantha in the Vyavahara Mayukha that thereby he seems to intend no more than is stated in the Mitakshara.

It is difficult to assume that the foot-note in Mandlik's Hindu Law, which was published in 1879, was not brought to the notice of the learned Judges. Apart from that, however, I think that the opinion expressed with reference to the meaning of the words used in the Vyavahara Mayukha is correct, if I may say so with respect. I do not desire to discuss this point in detail. I do not think it is reasonable to apply the rule referred to in the foot-note to the order mentioned in the Smṛti texts relating to the illustrative lists of Bandhus.

I can understand the force of this argument when applied to a text like the well-known text where the different heirs are mentioned in their order. But where the Bandhus are only intended to be indicated, it seems to me that it is not right to attach any importance to the order in which they are mentioned in each class. I feel justified in taking this view by the fact that Vijnaneshwara does not refer to this order as having any significance though he expressly points out that the order is indicated as regards each class of Bandhus.

It is further urged on behalf of the respondent that as two females intervene between the propositus and the defendant No. 2, he should rank after defendant No. 1 as an heir; and the decision in *Terumalachariar* v. *Andul Ammal* (4) has been relied upon in support of that general consideration. The Allahabad High Court has decided in favour of the mother's brother's son relying to a certain extent upon this ground. It seems to me, however, that there is no basis in the Mitakshara, or

(4) (1907) 30 Mad. 406=17 M. L. J. 285=2 M. L. T. 357.

the Vyavahara Mayuka for the general proposition which has been stated in the above Madras case somewhat too broadly.

I quite admit that the circumstance of more females than one intervening would render it easy for the Court in many cases to apply the test of propinquity, and to decide who is the nearer Bandhu. But I do not think that a Bandhu could be necessarily described as being more remote than another on the mere ground of two females intervening between him and the propositus. It depends upon the particular relationship. No doubt among the modern writers on Hindu law there is weight given to this consideration; and in the various tables that are to be found, the effect of this consideration is apparent. But all the writers are by no means agreed, for instance it appears from Golap Chandra Sarkar Sastri's Treatise on Hindu Law, p. 96 (4th Edn.), that in his opinion there is no basis for preferring one to the other on this ground I refer to this opinion as showing that the proposition is not universally accepted.

But I base my view upon the fact that the propinquity is the only test sanctioned in the Mitakshara and no general proposition which is not in terms sanctioned by Vijnanesvara can be laid down as being decisive. I think that each case should be dealt with on the basis of the particular relationship existing between the Bandhus and the propositus: and speaking with reference to these two Bandhus in particular, I do not think that the mother's brother's son can be said to be nearer to the propositus than the mother's sister's son.

In the recent case of *Dattatraya* v. *Jangabai* (5) in which this Court had to consider the subject of the succession among Bandhus, we declined to prefer one Bandhu to the other on the ground of the mother of the one being a preferential heir to the mother of the other. If the preference which may exist among the mothers is not to have any decisive significance, I do not see how the fact of the father of one Bandhu being a preferential heir to the mother of another Bandhu, if those persons were alive, could be allowed to determine the relative rights of their respective sons.

As regards these particular Bandhus, I think that this consideration is not sufficient to justify the preference of one to the other The *antarangatva* (near affinity) of these two relations is much the same, and I am unable to discover any substantial ground for ranking one above the other. The result is that both are equally entitled. It is clear that in the texts in which these Bandhus are mentioned as illustrative of the class there is no indication as to their relative rights *inter se*: and generally speaking it may be said that where the relationship is equally distant and there is no firm basis to prefer the one to the other, there is no reason why both should not be allowed to take equally.

Just as nothing is indicated as to the order in which the Bandhus in each class are to take *inter se*, nothing is indicated as to their taking equally in some cases. This alternative has been generally ignored in the discussions as to succession among Bandhus, and sometimes the order is settled as if this alternative was not open at all.

It seems to me, however, that in the case of these Bandhus when there is nothing definite to enable the Court to decide the question of preference, there is no reason why we should go out of our way to find out some possible ground for such preference. In such a case there can be no objection to give effect to the view that as both are equally near to the propositus they ought to take equally.

I would, therefore, allow the appeal to that extent, set aside the decree of the lower Court and direct that the property of Nagappa be equally partitioned between the defendant No. 2 and defendant No 1 and that the property sold to plaintiff be assigned to the share of defendant No. 2 as far as possible and handed over to the plaintiff.

Each party to bear his own costs throughout. The partition of lands liable to pay assessment to be effected by the Collector as provided by the Code of the Civil Procedure.

Macleod, C. J.—I have nothing to add. I entirely agree with the conclusions arrived at in the judgment which has just been read. *Decree varied.*

(5) A. I. R. 1922 Bom. 321=46 Bom. 541.

A. I. R. 1922 Bombay 424.

SHAH, AG. C. J. AND CRUMP, J.

Ganesh Moreshwar Joshi and another—Plaintiffs-Appellants.

v.

Vasudeo Vithal Paranjpe—Defendant-Respondent.

S. A. No. 510 of 1921, decided on 22nd June 1922 from the decision of D. J., Thana, in A. No. 73 of 1920.

(a) *T. P. Act, S 60—Suit to Redeem whole mortgage—One of mortgaged properties omitted in Suit—Omission is not fatal to suit.*

Certain property called Kelghar belonging to one B. was mortgaged by him to one J J. mortgaged certain properties belonging to him and his interest as mortgagee in Kelghar property to P. Subsequently the mortgage of Kelghar property in favour of J. was held by Court to be colourable. Now J, brought a suit for redemption against P. excluding the Kelghar property.

Held that the suit being one for redemption of the whole mortgage by payment of the whole amount due, was properly framed. The omission to include Kelghar property cannot be treated as any transgression of the rule, that the mortgage should not be split up, contained in S. 60 of the T. P Act. [P. 425, C. 2.]

(b) *C. P C. O '34, r. 1—Suit by mortgagee to redeem sub-mortgage—Original mortgagor is not a necessary party.*

In a suit by a mortgagee to redeem his sub-mortgage, the original mortgagor is not a necessary party though he may be a proper party. Seton on Decrees (7th edition P 2014; 13 Bom. L. R. 90 and 29 All. 385, F.B. Foll. [P. 426, C. 1.]

Coyajee and *P. B. Shingne*—for Appellants.

K. H. Kelkar—for Respondent.

Shah, Ag. C. J.—It is necessary to state briefly the facts which have given rise to this second appeal. Certain property belonging to one Bapat, which may be described as the Kelghar property, was mortgaged by him to Paranjpe in 1890. Subsequently in February 1900 Bapat mortgaged the same property to the present plaintiffs (Joshi brothers) for Rs. 2,000, which included the sum of Rs. 1,200 to be paid by the Joshis to Paranjpe in respect of the first mortgage. The present plaintiffs mortgaged certain properties belonging to them and their interest as mortgagees in the Kelghar property for Rs. 4,000 to Paranjpe in April, 1900. The consideration was stated in detail, as including the sum of Rs. 1,186-1-6, which was mentioned as being the amount due to Paranjpe under the mortgage by Bapat to him.

This mortgage was renewed in 1906 in the same terms. In 1903 the Kelghar property was sold in execution of a money decree against Bapat and purchased by the Rodis; but it was subject to the mortgage of 1900 in favour of the Joshis. This Rodis filed suit No. 131 of 1904 against the Joshis and Paranjpe for a declaration that the said mortgage was "colourable, unreal and without valuable consideration" and for a declaration that the property of Bapat was liable to be sold free from that mortgage.

The suit was brought in that form as the property was already declared subject to that mortgage in miscellaneous proceedings before the suit That suit was dismissed in the first instance, but in appeal (No. 292 of 1905) it was held that the mortgage was colourable and unreal and without consideration; and that defendants Nos. 5 and 6 (*i.e.* the Paranjpes) were entitled to a charge of Rs. 1,186-1-6 in respect of the earlier mortgage by Bapat in their favour. Accordingly a decree was passed declaring the property in that suit (*i.e.* the Kelghar property) subject to that charge in favour of the Paranjpes and that the mortgage in favour of the Joshis by Bapat was not binding upon the plaintiffs in that suit. This decree was affirmed by the High Court in *Ganesh* v. *Parsottam* (1).

Subsequently the Rodis filed another suit in 1909 to recover possession of the Kelghar property on the title acquired by them at the Court sale against the Joshis and Paranjpe. The claim for possession was allowed ultimately by the appeal Court; it is relevant to note that it was held in that litigation that the finding as to the true nature of the mortgage of February 1900 in the suit of 1904 was *res judicata* against them.

The Joshis filed the present suit against their mortgagee (Paranjpe) in 1917 for redemption of the mortgage of 1906. In the plaint they described all the mortgaged properties including their interest as mortgagees in the Kelghar property and stated the facts preceding the suit. They prayed for accounts under the Dekkhan Agriculturists' Relief Act, and further prayed that in taking accounts the property at Kelghar and the amount of Rs. 1186-1-6 should be excluded.

The defendant filed a written statement in which the above facts were stated but the effect thereof was contested. The

(1) (1908) 33 Bom. 311=11 Bom. L. R. 26=1 I. C. 106=5 M. L. T. 228.

trial Court found the first three issues in favour of the defendant and recorded no findings on the remaining issues. It held that the eight annas Khoti takshim of Kelghar required to be included in the present suit, that the Rodis were necessary parties, and that by the judgment in Appeal No. 292 of 1905, confirmed by the High Court in Second Appeal No. 186 of 1907, the defendant was not deprived of his right to claim Rs. 1,186-1-6 with interest from the plaintiffs.

The suit was dismissed as the plaintiffs refused to include the Kelghar property in the suit and to join the Rodis as parties. The plaintiffs appealed; but the same view was taken by the learned Judge, who affirmed the decree of the trial Court.

In the appeal before us it is contended that the lower Courts are wrong in holding that the inclusion of the Kelghar property and the non-joinder of the Rodis as parties are necessary steps. It is urged on behalf of the respondents that that view is right.

It seems to me, on a consideration of the arguments and of the plaint, that the suit is properly framed. It is really a suit for the redemption of the whole mortgage. The plaintiffs seek to establish that a part of the mortgage debt should be excluded from the accounts on certain grounds. That is a question to be decided in the suit between the parties on its merits, on the terms of the mortgage bond and in the light of the subsequent events with reference to the mortgage by Bapat in favour of the present plaintiffs; but the suit is one for the redemption of the whole mortgage, treating the mortgage debt as one entire debt.

I do not think that the inclusion of the Kelghar property in the suit is a matter of any practical importance on the facts of this case. It has been referred to in the plaint, and all the necessary facts relating thereto have been stated. If it were absolutely necessary to include it in the suit, it may be treated as having been so included. Mr. Coyajee for the plaintiffs concedes that if necessary it may be so treated. But he contends that its inclusion is wholly unnecessary: and I think that that contention ought to be allowed.

It must be remembered that the mortgage in suit includes the Joshis as mortgagees in the Kelghar property. It is clear that as regards the Kelghar property, the transaction in suit is a mortgage by a mortgagee of his interest in that property. The existence of that property depends necessarily upon the rights of the plaintiffs as mortgagees in that property. But it has been effectively determined as between the owner and the mortgagees that the mortgage was not real and that practically it had no existence. That adjudication was made in a suit to which the derivative mortgagee was a party.

The derivative mortgagee derives his title from the mortgagee, and if the mortgagee is proved to have no interest as a mortgagee as against the mortgagor (the owner), I do not understand how the derivative mortgagee can now contend that the property (i. e. his mortgagor's interest as mortgagee) should be brought in the suit as part of the property mortgaged to him. The parties to the present suit the mortgagee and his sub-mortgagee are bound by the finding that the present plaintiffs have no interest as mortgagees in the Kelghar property. The fact of their being in possession of the Khoti takshim of the village or a part of it, is disputed. The lower Courts have placed some reliance upon this fact. Even if it be a fact it does not appear to me to affect the question. The plaintiffs have stated in the plaint the fact that their interest as mortgagee is found to be non-existent. I do not see how the omission to include the Kelghar property (i. e. the plaintiffs' mortgage right therein, which is found not to exist) can be treated as any transgression of the rule that the mortgage should not be split up.

This rule is stated in the last para of S. 60 of the Transfer of Property Act. I am unable to hold that the omission to bring the Kelghar property, by which the mortgage right of the plaintiffs therein is meant, can be held to contravene in any sense the terms of the last clause of S. 60. The mortgagors here seek to redeem the whole mortgage, and have to pay the whole of the amount, which may be found due on taking accounts under the Dekkhan

Agriculturists' Relief Act before they can redeem the whole of the property mortgaged, *i. e.*, all the property except the mortgage right in the Kelghar property, which was supposed to have been in existence at the time of their mortgage to Paranjpe but which has been subsequently found to have never been in existence really.

In this view of the matter, the question of the non-joinder of the Rodis does not arise But I may point out that in a suit by a mortgagee to redeem his sub-mortgage the original mortgagor is not a *necessary* party, though he may be a proper party. The following note in Seton on Decrees, p. 2011 (7th Edition), is in point:—"The original mortgagee may redeem the derivative mortgagee and the latter may foreclose the original mortgagee without making the original mortgagor a party."

This view was accepted by this Court in *Someshwar* v. *Narainbhai* (2) which was a case of the sub-mortgagee suing his mortgagor (*i. e.* the original mortgagee) without joining the original mortgagor as a party. The same view is taken in *Ram Shankar Lal* v. *Ganesh Prasad* (3)

As regards the third point which has been decided by the lower Courts as to Rs. 1,186-1-6, it is true that it is not *res judicata*. It is clear that the question as to the plaintiffs' liability to pay the sum to the defendant in spite of the fact that the mortgage in their favour of the Kelghar property was a sham and colourable transaction could not have been and has not been decided in the previous suits between the Rodis and the parties to the present litigation.

But that is all, we think, that is decided by the lower Courts. We are not called upon to express any opinion, and we express none, as to the merits of the defendant's contentionthat he isentitled to recover that amount on the terms of the mortgage bond in suit. That will have to be considered by the trial Court when the question as to the amount due to the defendant under the mortgage according to the terms of the bond and the Dekkhan Agriculturists' Relief Act is dealt with by the Court.

As there has been some confusion in the argument as to this sum of Rs. 1,186-1-6, which originally represented the mortgage amount under the first mortgage by Bapat to Paranjpe, it is desirable to point out that it appears from the judgment in Appeal No. 292 of 1904 that the charge of Rs. 1,186-1-6 was declared in favour of Paranjpe as representing the amount of the mortgage, to him by Bapat and not on account of the subsequent transactions between (*a*) Bapat and the plaintiffs, and (*b*) the plaintiffs and Paranjpe. Only the amount was taken as settled on account of its having been mentioned in the subsequent mortgages.

I would, therefore, allow the appeal, reverse the decree of the lower appellate Court and remand the suit to the trial Court for disposal on the merits. The plaintiffs are entitled to the costs here and in the lower appellate Court. The costs in the trial Court to be costs in the suit.

Crump, J.—I agree.

Appeal allowed.

(2) (1911) 13 Bom. L. R. 90=9 I. C. 765.

(3) (1907) 29 All. 385=4 A. L. J. 273=(1907) A. W. N. 97=2 M. L.T. 248 (F.B.)

A. I. R. 1922 Bombay 426

MARTEN AND CRUMP, JJ.

In re Satyabodha Ramchandra Adabaddi.

Cr. Rev. No. 103 of 1922 decided on 9th June 1922.

Penal Code, S. 228—High Court—Delivery of final judgment—Scandalous attack on the High Court thereafter—Jurisdiction to commit for contempt exists.

The High Courts in India have jurisdiction to punish for contempt of Court where the contempt is made by scandalous attacks on its integrity and impartiality even though after the final judgment has been delivered in a case (Principles underlying the law of contempt of Court explained) 10 Cal. 109; 2 Q. B. 36 Ref. [P. 429, C.1].

S. S. Patkar—*Government Pleader* for the Crown.

Marten, J.—This is the hearing of a rule granted by the Chief Justice and Mr. Justice Shah on the April 11, 1922, at the instance of the Government Pleader calling upon Mr. Satyabodha Ramchandra Adabaddi, Editor and Printer of the *Vijaya* newspaper, to show cause why he should not be committed for contempt of Court in

respect of the publication of the article headed "End of the fifth scene of the First Act of the Painter-Marston-Shivlingappa shooting case" in the issue of the said paper of February 12, 1922.

The newspaper in question is one circulating in the Dharwar District and is a Kanarese newspaper, and the respondent appears to have published in this newspaper an article commenting on the judgments of Mr. Justice Pratt and Mr. Justice Kanga, in what is known as the "Dharwar riot case," which were delivered on February 11, 1922, dismissing certain appeals from the convictions and sentences of the Sessions Judge of Dharwar. The article, it will be observed, appeared on the next day. Whether the newspaper had seen a copy of the judgment before it wrote the article we do not know.

The innuendo which the Government Pleader seeks to put upon the article in question amounts in effect to this that the lower Courts were not giving independent and impartial decision but were merely registering the wishes of the Executive, and were passing sentences already prearranged with the Executive, and consequently it was useless to appeal to the High Court for no justice could be obtained there either, and that this Dharwar riot appeal was an example of such injustice.

The rule came before us on May 9 last when the respondent appeared in person. But when he then appeared, the official translation of this article was inaccurate and unsatisfactory and accordingly the case stood over to enable a proper translation to be made. On the adjourned hearing of the rule, the respondent did not appear but he has put in a written statement which in effect amounts to this that he had not the least desire, nor has he now, to bring into contempt this Honourable High Court.

But he submits that this article read as a whole amounts only to a fair comment on the decision of the Dharwar appeal. We have of course read the whole of his statement, but in effect his answer is fair comment. I may notice that there is no suggestion of any apology supposing it be held that the article is not fair comment.

In this case I am going to refer to principles laid down, I was going to say, many hundred years ago, but at any rate 165 years ago in England governing these matters. This is in no way out of disrespect to the decisions of Judges in India, but I take it that England has always been looked on as the home of liberty-liberty of person and property, liberty of speech, and liberty of the press.

Therefore if I turn to authorities which show the limitations which have been placed in England on the liberty of the subject and on the liberty of the press that seems to me as fair and impartial a guide as I can find, and moreover a guide that has stood the test of time. I accordingly turn to *Rex* v. *Davies* (1) and there I find the following in the judgment of Mr. Justice Wills who delivered the judgment of the Court. At p. 40 the learned Judge says:

"What then is the principle which is the root of and underlies the cases in which persons have been punished for attacks upon Courts and interference with the due execution of their orders? It will be found to be, not the purpose of protecting either the Court as a whole or the individual Judges of the Court from a repetition of them, but of protecting the public, and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired."

Then the learned Judge cites from the judgment of Chief Justice Wilmot in *Rex* v. *Almon* (2) (1765) and says as follows. This is the quotation (p. 40):—

"Attacks upon the Judges," he says "excite in the minds of the people a general dissatisfaction with all judicial determinations and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and dangerous obstruction of justice, and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges as private individuals, but because they are the channels by which the king's justice is conveyed to the people. To be impar-

(1) (1906) 1 K. B. 32=54 W. R. 107=75 L. J. K. B. 104=22 T. L. R. 97.
(2) (1770) 98 E. R. 411=5 Bur. 2686.

tial and to be universally thought so are both absolutely necessary for the giving justice that free, open, and unimpaired current which it has for many ages found all over this kingdom."

Then on the same page Chief Justice Wilmot went on :—

"I am as great a friend to trials of facts by a jury, and would step as far to support them as any Judge who ever did or now does sit in Westminster Hall, but if to deter men from offering any indignities to Courts of Justice it is a part of the legal system of justice in this Kingdom that the Court should call upon the delinquents to answer for such indignities in a summary manner by attachment, we are as much bound to execute this part of the system as any other. The several parts of the system act in combination together to attain the only end and object of all laws, the safety and security of the people".

Then in *Reg* v. *Gray* (3) Lord Russell, the then Lord Chief Justice of England, gave the judgment of the Court ; and at p. 40, he says:—

" Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court".

"This former class of contempt," the learned Judge says:—

"Is it to be taken subject to one and an important qualification. Judges and Courts are alike open to criticisms, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen".

I also cite this case because it is an instance where the article was published after the decision of the case.

Turning to our own High Court, a similar instance where an editor was punished for publishing a scandalous criticism of a judgment of this Court will be found in *In re Narasinha Chintaman Kelkar* (4). The decision of the Court there was given by Sir Basil Scott, and the editor there was Mr. Kelkar. I should say at once in favour of the respondent in the present case that unlike the article in *In re Narasinha Chintaman Kelkar* (4) and unlike the case in *Reg* v. *Gray* (3) he has not published what I will call filthy personal abuse of the Judge. The abuse I refer to will be found in the report in *In re Narasinha Chintaman Kelkar* (4) at p. 244 and need not be detailed here.

There has recently been a case of *Emperor* v. *Balkrishna* (5) before the Chief Justice and Mr. Justice Shah were the authorities on the point of jurisdiction were gone into, and there Sir Norman Macleod said with emphasis:—

"Your remarks were calculated to excite in the minds of the people, not only the impression that innocent persons were being prosecuted by the executive authorities and would not get a fair trial at the hands of a Magistrate alleged to be under the influence of those authorities, but also a general dissatisfaction with judicial determinations, so that a danger was created that the people's allegiance to the laws might be fundamentally shaken and a most fatal and dangerous obstruction to the administration of justice erected. The administration of justice within this Presidency has been entrusted to us, and we have the powers in execution of the trust imposed upon us to provide that such dangers when they arise shall be removed, and in exercising those powers we seek not so much to protect ourselves as to protect the people from the evil which will result if their faith in the authority and justice of our

(3) (1900) 2 Q. B. 36=69 L. J.Q. B. 502=16 T. L. R. 305=48 W. R. 474=82 L. T. 534.

(4) (1908) 33 Bom. 240=10 Bom. L.R. 1040=4 M.L.T. 359=2 I.C. 288=8 Cr.L.J. 426.

(5) A.I.R. 1922 Bom. 52=46 Bom. 592 =24 Bom. L.R. 16.

tribunals be impaired."

That then is the object which the Court has in view in exercising this powerful remedy of punishing for contempt of Court, *viz.*, the protection of the public.

There was also a case in *In re M. K. Gandhi* (6) before Mr. Justice Kajiji and myself against M. K. Gandhi, the Editor of *Young India*, for contempt of pending proceedings in the High Court, and there the law on the point was once more set out. As far as the question of jurisdiction is concerned, the decision of the Privy Council in *Surendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court* (7) established beyond any doubt that the jurisdiction for contempt of Court exists in the High Courts of this country.

Now two points arise here. First of all this article was published after the appeal had been heard. Accordingly we have to deal with the possible suggestion that it can hardly be said to be a comment on any pending proceeding as the possibility of any appeal to the Privy Council in a criminal case is so remote as to be negligible. But assuming for the sake of argument that the proceedings were concluded by the judgment of the Appeal Court, even then, the principles underlying the decisions on contempt in pending proceedings show, in my opinion, that a final judgment does not oust the jurisdiction of the Court, to protect its integrity and impartiality against scandalous attacks.

In my opinion a scandalous article of that sort still remains an interference with the due course of the administration of justice. The object and intention of such attacks is to induce the public at large to believe that a particular case has been tried by corrupt Judges, and that future cases will also be tried by corrupt Judges. It is sufficient for me to refer once more to the words of Chief Justice Wilmot to show that no High Court can tolerate that sort of abuse.

Holding as I do then that there is jurisdiction to punish for contempt in a case like the present, does the article which we have here amount to contempt of Court? I do not propose to read it in any detail. I personally have read it several times over, and have read it with the intention of grasping its meaning as a whole.

Having done that the innuendo which the prosecution alleges is, in my opinion, the proper and correct inference from the article taken as a whole, and it represents what in my opinion the writer of the article really intended to suggest in spite of what he said in his written statement. I may shortly indicate some of the passages to which special attention may be drawn.

The title in the first place is hardly an ordinary way of reporting fair comments on a trial. Then we get:

"We never had any faith in British justice. In the present times of repression however the Goddess of Justice has lost her vigour and depends only upon the Police and witnesses. At the time of the unjust decision of the Goddess of Justice, the truth speaking non-co-operators gave up the futile attempt of bringing forward evidence and witnesses."

Then further on:

" It is enough if there is evidence of eight or ten witnesses in favour of the complainant. That was what the authorities wanted. The punishment was already decided upon."

Then on the next page:—

'Several others who had some faith in the Goddess of Justice contented themselves with the delusion that a proper decision might be passed."

And further on,—

"Several persons had false hopes about High Court. They used to say 'what if injustice be done here, justice will be done in the High Court." The faith of those who had some faith in High Court was gone."

"Similarly, any third person also can say that it was quite unjust that the Judges of the High Court who form part of the bureaucracy should confirm the decision of the lower Court without examining the line of argument of the pleaders and the mattress, doors, stones. When decision is given without considering what the pleaders had said and what the papers and documents suggested, how can the

(6) (1920) 22 Bom. L. R. 368 = 58 I. C. 915.

(7) (1883) 10 Cal. 109 = 10 I. A. 171 = 4 Sar. 474 (P. C.)

Goddess of Justice live ?"

With regard to the word translated "bureaucracy" we have ascertained from the interpreter that that exact word is not used and that the literal translation of the vernacular is "Part of the class who are in power."

Then the article goes on at p. 11:

"This is disgracing of Justice."

Later on:

"Real arrogance is the arrogance of power. Before this arrogance the power of justice as well as of injustice will become blunt. For some time the regime of injustice will prevail. Just persons will have to be like dogs. They will have to bear injustice with folded hands. If this is not done a just person will be unjust. Therefore, Oh! my brothers, let there be any kind of injustice, let there be judgments like the judgment in the Dharwar shooting case...let anything happen, do not give up truth, do not take to the path of violence."

To call that sort of language fair comment is to my mind an entire misnomer, and I cannot for a moment accept the proposition that it would in any way be fair comment. In my opinion that article was a gross and unwarranted attack upon the impartiality and integrity of the learned Judges who heard the appeal in the case in question, and was a contempt of this High Court.

The next thing is what course we should adopt? The editor is a relative of one of the men who has been sentenced and this relative was also a former editor of the newspaper. Therefore one can understand that the respondent might have a strong personal bias, or at any rate a personal interest in the accused. Further, he is, judging by appearances, an old man, and if I may say so, without any personal disrespect, he gave me the impression of being an obstinate man and that it would be very difficult to disabuse him of any idea which had once entered his head.

The newspaper appears to be a small local newspaper with a daily circulation of some couple of hundreds. The accused, therefore, so far as I see appears to be what I may in colloquial language call a "small man." A heavy fine, therefore, would be one which in all probability he would be utterly unable to pay and it would be a crushing punishment. On the other hand, we cannot tolerate this sort of attack, and though those living in a large city like Bombay amongst a large number of educated people of all communities, may smile at these attacks of ignorant or semi-literate people in up-country districts, one must remember that to people living in these districts it is quite a different matter to experience these attacks.

A person who may appear to be a small man in Bombay may be a person with considerable power for evil or for good in a country district. Further this particular editor has hardly adopted the best way to assist his own case. If he had appeared to-day, one might have been able to obtain certain information which might have enabled us to excuse still further his conduct. But he has simply said: "This article is fair comment and I have done no wrong." In such a case I think we must pass some punishment which will bring home to his mind the fact that in our judgment he is entirely wrong and that the course he adopted in publishing this article was an extremely improper one.

There is one further matter which is mentioned to us by the Government Pleader and that is that pending the hearing of this case he republished the article once on the 9th May, *viz.*, the same day we heard the case originally, and that that fact was stated in the newspaper and once more the article was republished. This was in spite of the fact that I warned him personally that he would be well advised not to publish any more articles commenting on the decision in the Dharwar case.

However the respondent is entitled to have the matter strictly heard, and we have no rule *nisi* before us in respect of the republication of this particular article. Therefore I dismiss that fact from my mind in considering what course should be taken in the present case. At present I only mention it to say that if the facts, as stated by the Government Pleader, are correct in this respect, and if this editor, notwithstanding the present decision seeks to repeat this article, he will find matters will go hard with him

and that a far more severe punishment will be meted out to him than the one we propose to give him to-day.

Our decision will be that he be fined a sum of Rs. 200 and that in default of payment he be imprisoned for one month or until the fine has been paid.

Crump, J.—The principles which should govern our action in this case have been so clearly explained by my learned brother in his judgment that it is unnecessary for me to deal with the authorities upon which these principles are based. It is sufficient for me to say that we act in these matters not to defend the dignity of any Court or Judge but to safeguard the proper administration of justice and to ensure that the confidence of the public in that administration shall not be in any way impaired.

Now what we have to consider in approaching this article is whether the mischief which I have indicated, that is to say, the impairing of the public confidence or the hampering of the due administration of justice is likely to be caused by the language used by the respondent in this case. I have read that article with care more than once and the general tenor of it appears to be somewhat as follows:—

First the writer sets out that he himself has no faith in the British justice and that truthful non-co-operators have on that ground given up futile attempts to bring forward evidence in any case in which they were concerned. Then the writer goes on to elaborate his theme by pointing out that it was sufficient if the prosecution called eight or ten witnesses whose evidence is necessarily accepted, and that upon such evidence a predetermined penalty follows. That is a general attack on the administration of justice.

He then goes on to point out in regard to this Dharwar riot case, that after the convictions in the Dharwar Sessions Court certain persons were under delusion that a proper decision might possibly be passed on appeal to the High Court. The writer says:

"The delusion of all people became futile like the hopes of a person who pursued the mirage, taking it to be water, like those of the persons who washed tamarind in the river. Even those who had some hopes as to the appeals, understood to what extent there was justice in the British Goddess of Justice."

Then he goes on to say, and here the meaning is clear enough, that the hopes of certain deluded persons that things would be otherwise in the High Court were frustrated and that the result of the appeal has shown that the High Court is no better in this matter than the lower Court. To make the point further clear, he goes on to say "Several persons had false hopes about High Court. They used to say 'what if injustice be done here, justice will be done in the High Court.'"

Then he says that the appeal was a kind of poison but that poison sometimes becomes nectar, and that one good result at least has ensued that certain persons among co-operators being pained by this decision would become non-co-operators. That means of course that the unjust decision of the High Court will pain those persons who hitherto had hopes of justice from the tribunal, that they too will join that body of persons who believe that no justice is to be obtained in the Courts of law in this country.

Finally the innuendo is pointed in these words:

"Similarly any third person also can say (by third person the writer means to say any unprejudiced person not concerned in the matter before the Court) that it was quite unjust that the Judges of the High Court who form part of the bureaucracy should confirm the decision of the lower Court without examining the line of the argument of pleaders and generally without doing that which it was their duty to do as Judges holding judicial offices".

The word 'bureaucracy" is unfortunate in the translation. It means, as I understand the Kanarese, that High Court Judges also belong to the class of officials and that as they belong to the class of officials they too are influenced by official considerations in coming to the conclusion at which they arrived.

There is nothing more in the article to which attention need be drawn, for, the meaning of the whole matter is clear enough. Now, as I understand

the law, it is perfectly open to any body to say that the decision of this Court is a wrong decision and I myself should not object to the term 'unjust'. But it is not open to any one to say that the decision of this Court has been arrived at upon grounds such as are indicated in this article. Any Judge influenced by such considerations as are here indicated would be a corrupt Judge, and therefore the article practically says that the administration of justice in this Court is not pure.

Now that being so, what is our duty with reference to this matter? Speaking for myself, I find that attacks of this nature are becoming by no means infrequent in the columns of certain journals, and I cannot conceal from myself that such attacks must necessarily create an impression upon the minds of readers of those journals. The mischief therefore which I have indicated at the opening of this judgment is, I fear, likely to grow unless criticism of this nature is checked. I would not for a moment do anything to check healthy criticism if such criticism points out the shortcomings of the Court, without imputing to them motives which can only be regarded as corrupt motives. Such criticism any independent Judge would accept or welcome, but such allegations as are made here transgress the limits of legitimate criticism.

Therefore, though this respondent is not a man of any great influence or position so far as can be judged from the facts before us, and though the paper for which he is responsible has a small circulation, I do not myself feel that we should be doing our duty if we allowed such attacks to pass unchecked. Therefore after giving the matter my fullest consideration, I agree with the order proposed by my learned brother, that is to say, that there should be a fine of Rs. 200 or in default that respondent should be committed to prison for a term of one month or until payment of fine.

It is not necessary to deal at any great length with the statement which the respondent has put in. For that statement is wholly inadequate as an apology for offence of which he has been found guilty. Had he expressed his regret in an unequivocal and straightforward manner, he might not, I think, have been dealt with severely in this case. But the absurd suggestion that this is fair comment shows that he is totally unaware of the seriousness of his action if indeed he means to plead that this is fair comment.

Rule made absolute.

A.I.R. 1922 Bombay 432

MACLEOD, C. J. AND SHAH, J.

Bandra Municipality—Defendant-Appellant. v.

John C De Mellon—Plaintiff-Respondent.

S. A. No. 410 of 1921 decided on 13th April 1922, from the Joint J., Thana, in App. No. 104 of 1920.

Bombay Municipal Act, S. 145-A—Permission to build on old wall—Pulling down the wall and rebuilding it—Municipality cannot withhold permission.

Plaintiff wanted to build another storey on his western wall, and got permission. According to the compromise in a dispute with his neighbours he agreed to pull down the old wall on which he was going to build and to build further back. The Municipal Committee objected to this. The plaintiff therefore began to follow out his old plan, the Municipality again objected.

Held: the objection was factious. The Municipality was not entitled to object to the rebuilding of the old wall where it stood with the addition to which it had given permission.

[P. 433, C. 1.]

The Government Pleader—for Appellant.

H. C. Koyajee (with *R. W. Desai*) for Respondent.

Judgment:—The plaintiff is the owner of a house within the limits of the Bandra Municipality. He asked for permission to build another storey on his western wall, and permission was given. Then he had a dispute with his neighbour which was compromised with the result that he agreed to build further back and so he pulled down the old wall on the top of which he was going to build. The Municipality then objected to his building according to the compromise at which he had arrived with his neighbour. So the plaintiff determined to follow out the first plan with which he had started and to rebuild on the old foundation of the western wall. The Municipality then objected to that on the ground that he had not permission to build there and that under law 145-A if he wanted to erect a building it

would have to be 10 feet away from the boundary.

It seems to me that this objection to the plaintiff's building was somewhat factious as the Municipality had no objection in the first instance to the plaintiff's raising his wall, although it was within 10 feet of the boundary. It has been contended that as the plaintiff pulled down his old wall he can no longer avail himself of the permission granted to increase the height of the old wall. But we do not think on the merits that the Municipality is entitled to object to plaintiff's rebuilding his wall as it originally stood with the addition for which they had already given permission. We think, therefore, that the appeal should be dismissed with costs.

The cross-objections are dismissed with costs. *Appeal dismissed.*

A. I. R. 1922 Bombay 433.

MULLA, J.

K. C. Mehta—Plaintiff.

v.

Cassumbhai Keshavji—Defendant.

O. C. J. Suit No. 582 of 1922 decided on 27th June 1922.

(a) *Contract Act, S. 219—Principal and agent—Broker—Non-completion of contract owing to default of principal—Broker is entitled to his commission.*

A broker in order to be entitled to his commission must prove either that the transaction has been completed or that, if it is not, the non-completion was due to default on the part of the principal. 10 T.L.R. 76, Foll.

[P. 434, C. 2.]

(b) *Mortgage—Production of title deeds—Mortgagee in Bombay is not bound to produce or deliver to mortgagor until actual redemption.*

A mortgagee in Bombay is not bound to deliver possession of the title deeds, or to produce them for the inspection of the mortgagor until actual tender or payment of the principal, interest and costs. 5 Bom. H.C.R. (O.C.) 152, 155, 157 ref.

[P. 435, C. 2.]

Lalji—for Plaintiff.

Jayakar and *Brumhandkar*—for Defendant.

Mulla, J.—This is a suit to recover Rs. 4,000 being brokerage alleged to be due from the defendant to the plaintiff.

The plaintiff's case is that in December 1921 he was employed by the defendant as a broker to raise a loan of Rs. 2,00,000 on a mortgage of the defendant's property at Ripon Road. The terms of employment as to which there is no dispute between the parties were that the defendant should pay brokerage to the plaintiff at the rate of two per cent, on completion of the mortgage.

The plaintiff says that he went and saw two or three persons about the loan and that eventually he saw Mr. Cama, who expressed his willingness to make a loan if the property was a substantial one. Mr. Cama, accompanied by the plaintiff the defendant and the defendant's son, went and saw the property, and he eventually agreed to advance Rs. 2,00,000 on a first mortgage of the said property at interest at the rate of nine per cent. per annum free from income tax.

Thereafter, on the 11th January 1921, the plaintiff, the defendant and his son saw Mr Cama at his office pursuant to an appointment made with him, and from there they proceeded to the office of Messrs. Shroff & Lam, Mr. Cama's attorneys. There the remaining terms of the loan were discussed and settled, and Mr. Lam made a note (Ex. A) of the terms agreed upon between the defendant and Mr. Cama. There is no dispute between the parties as to these terms; in fact the notes made by Mr. Lam were put in by counsel for the plaintiff in his opening with the consent of counsel for the defendant.

After the terms were recorded by Mr. Lam, the defendant's son requested Mr. Lam to write a letter to one J. M. Mehta, who was the first mortgagee of the said property for Rupees one lac, to send the title-deeds to him for investigation of title. Mr. Lam, thereupon, wrote the letter Ex. B. The defendant's son also requested Mr. Lam to prepare a formal agreement of mortgage. Mr. Lam said that there was no necessity of a formal agreement as he had made a full note of all the terms agreed upon between the parties.

The defendant's son, however, told Mr. Lam that he wanted a formal agreement to show it to the first mortgagee, so that he might send the title deeds to Mr. Lam. Mr. Lam undertook to prepare a formal agreement and he eventually drafted one. The defendant's son stated in his evidence that the plaintiff asked Mr. Lam to prepare the agreement, but I do not believe his evidence on this point.

After a few days the plaintiff went and saw the defendant's son at his shop. The defendant's son told him that the first mortgagee did not want

to part with the title-deeds and that the first mortgagee having come to know of the agreement between the defendant and Mr. Cama, he himself was willing to make a further advance to the defendant and to extend the time for redemption. The defendant's son also told the plaintiff that he was prevailing upon the first mortgagee to part with the title-deeds. The defendant's son also went and saw Mr. Lam and informed him to the same effect.

On or about the 19th January 1922 the plaintiff again went and saw the defendant's son at his shop when the defendant's son told him that the first mortgagee had agreed to make a further loan to him and that would save him costs and brokerage. Thereupon the plaintiff demanded brokerage from the defendant's son. The later told him that he would give him some other job to enable him to make up for the loss.

On the same day the plaintiff sent a solicitor's notice (Ex. C) to the defendant To the said notice the defendant replied on the 24th January 1922 (Ex. C), stating that there was no concluded agreement for a mortgage between the defendant and Mr. Cama, and that the plaintiff's claim was false.

Mr. Cama also sent a solicitor's notice to the defendant on the 20th January 1922 (Ex. D) to which the defendant sent a similar reply on the 24th January 1922 (Ex D).

The defendant has filed his written statement. The first defence is that there was no concluded agreement between him and Mr Cama for the loan and that matters had rested in negotiations only. The defendant stated in his evidence that he did not agree to any of the terms taken down by Mr Lam and that there was nothing but a talk about the terms of the loan in Mr. Lam's office. I think this is absolutely untrue After the terms were arranged, he instructed Mr. Lam to write a letter (Ex: B) to the first mortgagee which runs as follows :—

"We are instructed by Mr. Cassum Keshvji the above named mortgagor to address you as under :—

That he has entered into an agreement with our clients Messrs. J. H. Cama and others to take a loan from on a first legal mortgage of the above property which is at present under mortgage to you.

We are instructed that due intimation has already been given to you by the said Mr Cassum Keshavji of his intention to redeem your mortgage."

At the end of the letter there is a request to the first mortgagee to send the title-deeds to the attorneys for the investigation of title.

In this letter it is clearly stated that the defendant had agreed to take a loan from Mr. Cama. The defendant's son admits that this letter was read out and interpreted to him by Mr. Lam before it was despatched.

I hold on the evidence of the plaintiff and Mr. Cama, corroborated by the independent testimony of Mr Lam, that there was a concluded agreement between the defendant and Mr. Cama whereby Mr. Cama agreed to lend and the defendant agreed to borrow rupees two lacs from Mr Cama on a first mortgage of the defendant's property upon the terms contained in Ex. A.

The second defence is that the brokerage was payable on completion of the mortgage, but as the mortgage was not completed, the defendant was not bound to pay brokerage. It is true that the mortgage was not completed as stated by the defendant. The plaintiff is not therefore entitled to the brokerage claimed unless he proves that the mortgage was not completed owing to default on the part of the defendant. It is well established that in order to entitle a broker to his commission, he must prove either that the transaction has been completed or that, if it is not, the non-completion was due to default on the part of the principal: see per Lindley L. J. in *Luff* v. *Outh Waite*, (1).

Such being the law, it remains to consider whether the non-completion of the mortgage was due to default on the part of the defendant. The defendant's case on this point is thus stated in his written statement (par graph 2) :—

"The defendant says that as the former mortgagee declined to part with the title-deeds unless and until

(1) (1893) 10 T. L. R. 76.

the amount of their money was paid to them the negotiations fell through."

In his evidence the defendant's son stated that on the 15th or 16th January 1922 he went and saw Mr. Lam and told him that the first mortgagee refused to part with the title-deeds and that Mr. Lam thereupon told him that unless he had full and free inspection of the title deeds he would not advise Mr. Cama to advance a single pie to the defendant. This case is nowhere set out in the correspondence before suit, nor was a single question put to Mr. Lam about it in his cross-examination, and when with the leave of the Court Mr. Jayakar interrogated Mr. Lam about it at the fag end of the case, Mr Lam stated emphatically that he did not say anything of the kind to the defendant's son.

On the other hand, the version given by Mr. Lam is that the defendant's son told him that the first mortgagee would not part with the title-deeds but that he *was prevailing upon him to do so*. Mr. Lam says that the defendant's son left him under that impression, and this is corroborated by the two letters Exh. D. The first of them was a letter addressed by Messrs. Shroff & Lam on behalf of Mr. Cama to the defendant on 20th January 1922. The letter says:—

"Under your instructions a draft agreement for mortgage was prepared by us setting forth in detail all the terms and conditions of the said intended mortgage.

Thereafter your son attended our office and informed us that the present mortgagee was giving trouble and stated that you would call again and inform us as to how you wished to proceed in the matter.

We regret since then neither yourself nor your son has called at our office to give us the necessary instructions to proceed further.

Under the above circumstances we have to write this to you asking you to see us in the matter immediately."

To the said letter the defendant replied on the 24th January 1922, stating that the negotiations for the loan were never completed and that the defendant therefore did not think it necessary to attend the office of Messrs. Shroff & Lam. At the end of the letter it is stated that under the circumstances it was not necessary that the defendant should see Messrs. Shroff & Lam as required in their letter. It is nowhere stated in this reply that the defendant's son did not see Mr. Lam because Mr. Lam had finally told the defendant's son that he would not advise his client to make the loan unless the title-deeds were produced to him. Had the defendant's son told Mr Lam that the first mortgagee was firm in his refusal to produce the deeds, Mr. Lam would have investigated the defendant's title to the property by taking search of the records of the Sub-Registrar of Bombay.

A mortgagee in Bombay is not bound to deliver possession of the title-deeds; or to produce them for the inspection of the mortgagor, until actual tender or payment of the principal, interest and costs. It was so held by Westropp, C. J. in *Beatty v Jetha* (2). Where a mortgagee refuses to produce the title-deeds, and such cases are not uncommon, the mortgagor's title may be investigated by taking search of the records of the Sub-Registrar of Bombay. It was contended by Mr. Jayakar on behalf of the defendant that no such suggestion was made by Mr. Lam to the defendant or his son.

The answer to that is that that stage was never reached so far as Mr. Lam was concerned, for when the defendant's son last saw Mr. Lam he left Mr. Lam under the impression that he was prevailing upon the first mortgagee to part with the title-deeds. The truth of the matter seems to be that the first mortgagee must have at first refused to part with the title-deeds, but that when he learned that the defendant had arranged for a loan elsewhere he himself offered to advance a further loan. Further the due date of payment of the first mortgage was drawing nigh, and there was a possibility, if the loan was taken from Mr. Cama that the defendant's title might not be accepted by his attorneys

On the other hand, if the defendant borrowed further money from the first mortgagee, there would

(2) (1808) 5 B. H. C. R. (O.C.J.) 152.

be no fresh investigation of title, and the additional loan could be made on a further charge. A fresh mortgage for rupees two lacs would not be necessary and that would save stamp and registration charges on rupees two lacs. As it happened, the defendant's son finally arranged for a further loan with the first mortgagee on the 15th or 16th January 1922 and the only fresh document executed was a deed of further charge for Rs. 70,000.

The defendant's son in the course of his evidence meant to convey that the refusal of the first mortgagee to part with the title-deeds, coupled with Mr. Lam's final reply left him no alternative but to accept the offer of a further loan from the first mortgagee. I do not think that was so. I do not believe the defendant's son when he says that he saw Mr. Lam, that he told Mr. Lam that the first mortgagee refused to part with the title-deeds, and thereupon Mr. Lam told him that he would not advise his client to advance money unless the title-deeds were produced.

Had the first mortgagee persisted in the refusal—as to which there is no satisfactory proof, he being not called as he was not in Bombay—the defendant's son ought to have gone and seen Mr. Lam about it. He did not do so, and when he was requested by Mr. Lam's letter of the 20th January 1922 to see him, he sent a blunt reply, saying that there was no agreement for a mortgage and it was therefore not necessary to see Mr. Lam.

Upon these facts, I hold that the non-completion of the mortgage was due to default on the part of the defendant, and pass judgment for the plaintiff for Rs. 4,000 and costs and interest on judgment at six per cent. per annum

Suit decreed.

A. I. R. 1922 Bombay 436.

MACLEOD, C. J. AND COYAJEE, J.

Khimchand Narotamdas Bhavsar—Defendant-Appellant

v.

Bhogilal Hirachand Shah—Plaintiff-Respondent.

Civil A. No. 32 of 1921, decided on 18th January 1922 from order of First Class Sub-J., Ahmedabad, in C. S. No. 85 of 1918.

Civil P. C., Sch. II—Application to file award out of Court, as adjustment of suit under O. 23, R. 3, C. P. C.—Subsequent reference of dispute through Court to arbitration—Failure of arbitration—Application under O. 23, R. 3 cannot be pressed.

The parties to a suit referred their disputes to arbitration without the intervention of the Court. The arbitrator having made the award, the plaintiff presented an application to file the award as an adjustment under Order XXIII, rule 3, of the Civil Procedure Code. Subsequently the parties applied to the Court to appoint an arbitrator through the Court for the sake of settling disputes between the parties. The Court made the order, but the arbitration fell to the ground. The plaintiff thereupon pressed his previous application under Order XXIII, rule 3.

Held, when the parties applied to the Court subsequently for the appointment of an arbitrator through Court, they had agreed that all the previous arbitration proceedings should be annulled and the petition under O. 23, R. 3 was not competent. [P. 437, C. 1.]

Jinnah and *H. D. Nanavati*, *T. P. Munim* and *H. V. Divatia*—for Appellant.

B. J. Desai and *G. N. Thakor*—for Respondent.

Macleod, C. J.—The plaintiff sued for dissolution of partnership. The suit was filed on the 8th February 1918. On the 13th February 1918, an order was passed under the 3rd clause of the Second Schedule of the Civil Procedure Code referring the matters in dispute to two arbitrators, Mr. Thakordas and Mr. Trikamlal. Later on the parties informed the Court that they had cancelled the reference to these gentlemen, and had privately appointed Mr. Trikamlal alone as the sole arbitrator. That was consequently an arbitration without the intervention of the Court. Mr. Trikamlal delivered his award on the 18th April of 1919. On the 15th August 1919, the plaintiff presented an application to file the award as an adjustment under O. 23, Rule 3 of the Civil Procedure Code. But previous to that, on the 25th June 1919, he had filed a suit on the award, (Suit No. 572 of 1919).

Then on the 18th March 1920 the parties made an application to the Court that as certain contentions had been raised against the award by the first and second defendants, for the sake of settling disputes between the parties, the Court would be pleased to appoint Mr. Trikamlal as an arbitrator through the Court and after taking evidence which the parties might have to adduce, he should give his award and the parties should treat that award as final. On the same day

the Court appointed Mr. Trikamlal sole arbitrator with the consent of the parties; and he was to submit his award on or before the 15th April 1920. Mr. Trikamlal was unable to submit his award by that date, and eventually returned the papers, so that the arbitration proceedings fell to the ground.

On the 17th November 1920, the plaintiff withdrew Suit No. 572 of 1919, and continued his application under O. 23, Rule 3.

The first issue was whether the application, Exhibit 29, for recording an adjustment on reference, dated 14th October 1918, and the alleged award, dated 18th April 1919, could be entertained any longer after the application and order, dated 18th March 1920. On that issue the Judge found that the terms of Exhibit 47, *i.e.*, the application for a fresh order of reference, did not make the previous reference nugatory and of no effect, so that the previous reference and the award thereon remained to be enforced.

The learned Judge admitted that no exact authority could be found, but he held that the previous contract was not cancelled, nor was a new complete contract, that could be enforced, substituted. It appears to us obvious that when the parties applied to the Court on the 18th March 1920, to appoint Mr. Trikamlal sole arbitrator, they agreed that all the previous arbitration proceedings should be annulled.

It was suggested by the respondents that the effect of the application and order of the 18th March 1920 was merely conditional, that if for any reason what we may call the third arbitration proceeding should result in nothing, the second arbitration proceeding could be revived, and any of the parties who wished to rely upon the second arbitration proceeding as an adjustment of the suit, should apply to the Court under Order 23, Rule 3.

We cannot accept that proposition, which is opposed to general principles, and it is impossible to conceive what complications might result if such a suggestion were acceded to. But we must read, in our opinion, the application and order of the 18th March 1920, according to its ordinary meaning and the only construction we can put on that application and order is that the previous arbitration proceedings were considered as at an end, as the parties had agreed to a fresh arbitration of a different character to the previous arbitration, although the arbitrator was the same.

We think, therefore that the finding of the learned Judge in the Court below that the present application to record the award of the second arbitration proceeding as an adjustment was a good application, was wrong, and that that arbitration having failed, the result was that the parties were relegated to their original position and the suit must continue.

It is not, therefore, necessary to deal with other issues in the case and to decide whether a decree could be passed in terms of the award of the 18th April 1919. The appeal must be allowed and the suit must continue. The appellant to have his costs throughout from the plaintiff and defendants Nos. 2, 3 and 4. *Appeal allowed.*

A. I. R. 1922 Bombay 437.

MACLEOD, C. J. AND COYAJEE, J.

Dayaram Premji--Def. Appellant.

v.

Bechardas Doongersey—Respondent.

O. C. J. Appeal No. 138 of 1921 decided on 27th February 1922 from the decision of Kajiji, J.

(a) *T. P. Act (IV of 1882), S. 6 (a)—Interest of the next reversioner in the property in the hands of a Hindu widow is not transferable.*

The next reversioner to an estate inherited by a Hindu widow executed a document by which he purported to release all his rights as a reversioner in her favour. *Held* as this document transgressed the provisions of the T. P. Act, S. 6 (a), it could not take effect as vesting in the widow the absolute estate in the property left by her husband. There is no estoppel against the reversioners. [P 438, Col. 1]

(b) *Evidence Act, S. 115 — Transfer of Reversionary interest – Transferee not acting thereon – No estoppel is created.*

Where the next reversioner transferred his rights to the widow of the deceased owner but the transferee did not deal with the property in her life-time on that basis *held*, that there is nothing on which the estoppel could act and that on the widow's death the next reversioner will inherit the property in the ordinary course of law. [P. 438, C. 1.]

Desai and *Kania*—for Appellant.

Jinnah—for Respondent.

Macleod, C. J.—The plaintiff, who died pending the hearing of the suit, claimed to set aside a document executed by him on the 6th November 1917, by which he purported to release all his rights as a reversioner in the estate of his deceased brother in favour of his widow Sunderabai. Really the document of the 6th November 1917 trangressed against the provisions of

S. 6 (a) of the Transfer of Property Act and, therefore, could not take effect as vesting in the widow the absolute estate in the property left by her husband. She might have disposed of the immoveable property in her life-time, but she had not done so, and therefore, on her death, the property would go to her nearest reversioner. However Sunderabai made a will apparently thinking that she was absolutely entitled to her husband's estate and her executor the first defendant resists the plaintiff's claim.

It was first suggested that the transaction evidenced by the relinquishment deed of 6th November 1917 was a family arrangement, and, therefore, should be given effect to. But on reading that document it will be clearly seen that it purports to be a transfer of Mulji's right as a reversionary heir in the estate of his deceased brother.

Then the first defendant objected to the plaintiff's suit on the ground of estoppel. It is difficult to see how there could be any estoppel, as that estoppel could only take effect, if Sunderabai in her life-time, relying upon the relinquishment deed, purported to deal with the property, which she could have done in any event, and therefore, the relinquishment deed could have had no effect with regard to any alienations she might have made in her life-time. But as she possessed the property in fact, there is nothing on which the estoppel could act, and on her death it went in the ordinary course of law to the reversioner.

The appeal, therefore, must be dismissed with costs.

But the appellants object to the order made in the lower Court directing the first defendant as executor of Sunderabai to pay the plaintiff's costs of the suit. That could not form the subject-matter of an appeal by itself, unless it could be said that some important principle was involved. But now as we are hearing the appeal on its merits, it is open to us to consider whether it is right in a suit of this character that the plaintiff should get his costs from the first defendant. He claimed far more than what he was entitled to, and also made allegations in the plaint that by some means or other he was wrongfully induced to relinquish his reversionary rights, and considering that he was responsible for all the troubles which have arisen, we certainly think it is not just to make the first defendant pay the plaintiff's costs of the suit.

The order of the lower Court will be varied by directing that as between the plaintiff and the first defendant each party is to pay his own costs. The appellants will pay the costs of the appeal.

Appeal dismissed.

A. I. R. 1922 Bombay 438.

SHAH, AG. C. J. AND CRUMP, J.

Vithal Dhondji Devli and others—Defendants-Appellants.

v.

Suryaji Ramchandra Naik—Plaintiff-Respondent.

S. A. Nos. 239 and 253 of 1921 decided on 13th June 1922 from the decision of D J., Ratnagiri in A. Nos. 30 and 26 of 1919.

(a) *Bombay Summary Settlement Act (1863), S. 7—Property described as private in sanad. —Suit to establish it as temple property is not barred.*

Where certain temple lands in the possession of the temple servants (defendants) were described as their private property (jat-Inam) in a Sanad issued by Government in 1865 under the provisions of the Summary Settlement Act, 1863.

Held that under the proviso to S. 7 of the Summary Settlement Act 1863 the Sanad granted to the defendants (the temple servants) did not negative the right of the plaintiff to establish if he could, that the lands were really Devasthanam lands and not the private property of the defendants. [P. 439, C. 1,]

(b) *Limitation Act, Art. 120—Bombay Summary Settlement Act, (1863), S 7 — Record of land as 'private' land of temple servants— Subsequent alienation by servant— Cause of action for declaratory suit is the alienation and not the grant of Sanad.*

The temple lands in possession of the temple servants were recorded in the Sanad under Summary Settlements Act S. 7 as their private lands (Jat inam) and one of the servants alienated some portion of the lands in 1903 but the vendee did not take possession till 1916. Plaintiff sued on behalf of the managing committee of Gaukars for a declaration that the lands belonged to the Devasthan. *Held* the cause of action arose within the meaning of Art. 120 only when the defendant attempted to alienate the lands and not by the mere grant of Sanad. But the article did not apply in the

case as plaintiff claimed possession.
[P. 440, C.1.]

A. G. Desai—for Appellants.

K. N. Koyajee—for Respondent.

Shah, Ag. C. J.—These two appeals arise out of a suit filed by the plaintiff as representing Gaukars of the village of Khandli entitled to the management of the temple against the defendants who were the Devlis and the Bhavnis connected with the temple as servants and defendants Nos. 29 and 30 who were alienees from defendant No. 1. The plaintiff's case was that the lands in suit were really Devasthan lands given to the defendants Devlis and Bhavnis for the services which they rendered to the temple, and that the alienation of these lands was invalid. He sued for a declaration that the property was Devasthan property and prayed for possession of the lands.

The defendants in substance pleaded that these lands were Jat-inam property of the Devlis and that they were entitled to alienate the lands. It was apparently common ground in the lower Court that if it was found these lands were Devasthan property, the alienation would be clearly invalid. The trial Court found in favour of the plaintiff and passed a decree making the necessary declaration and ordering that the land in the possession of defendants Nos. 29 and 30 should be restored to the plaintiff.

In the appeals to the District Court, the same points were in controversy between the parties, and the result of the decision of that Court was that the decree of the trial Court was confirmed.

Two appeals are now preferred to this Court one by defendants Nos. 29 and 30 and the other by defendant No. 27. The contentions urged in support of these appeals are that the finding of the lower appellate Court that the property was not the Jat inam property of the defendant but the Devasthan property, is wrong, and that it was not open to the lower appellate Court to come to that conclusion in view of the fact that a Sanad under the Summary Settlement Act (VII of 1863) was granted to the defendants in which the property was described as the private property of the holders. Further it is urged that the plaintiff's claim is time-barred and that the amendment as to the claim for possession, should not have been allowed.

As regards the first point which is clearly the only point of importance in the case it is no doubt true that the Sanad granted to the defendants in respect of the lands in suit under Act VII of 1863 describes the property as the private property of the holders. But it is clear from the proviso to S 7 of that Act that "the rightful owners of the property shall not by this Act or anything therein contained be deprived of any right or remedy to which they may be entitled against the holders and their heirs and assigns for the recovery of the said lands dealt with under the Act".

It follows that the Sanad granted to the defendants does not negative the right of the present plaintiff to establish if he can, in this suit that the lands are really the Devasthan lands and not the private property of the defendants.

Mr Desai has not been able to suggest any answer to the effect of this proviso to S. 7 to which I have referred, and his argument on this point when analysed really comes to this that the evidence upon which the lower appellate Court has relied in coming to the conclusion that the property is Devasthan property and not the Jat-inam property does not really justify that inference.

It is also suggested in the course of the argument that a part of the evidence referred to by the lower appellate Court was not admissible in evidence. It does not appear that any point as to the admissibility of evidence was taken either in the trial Court or in the lower appellate Court. Mr. Desai has not been able to point out how any particular statement is inadmissible in evidence. Treating the statements referred to by the lower appellate Court as evidence in the case, it is really a question of appreciation of the evidence on the point. Both the Courts have decided in favour of the plaintiff and against the defendants and I do not think that in second appeal any valid reason is shown for disturbing that finding.

But I may add that there is one broad consideration which strongly supports

the finding and that is that the defendants who are servants of the temple have been rendering service to the temple: and it is not shown in the course of argument before us by Mr. Desai as to what other remuneration these persons have been receiving for this service.

The plaintiff's case is that the remuneration they receive is the income of the land which they hold on behalf of the Devasthan. That is the inference which the lower appellate Court has drawn, and it seems to me almost inevitable under the circumstances. The absence of any explanation on the part of the defendants as to how they are otherwise remunerated for their services, is a circumstance which tells against their contention.

As regards the point of limitation, the only article relied upon is article 120 of the Indian Limitation Act. But I do not see how it could be said that the fact of the Sanad having been granted to the defendant constitutes a cause of action upon which the plaintiff could sue the defendants. They performed their services and rightfully enjoyed the profits of the land during all this time, and it was only when they attempted to alienate the land wrongfully to strangers, that the occasion for filing the present suit arose.

It could not be said that the right to sue accrued within the meaning of article 120 at the time when the Sanad was issued. No authority has been cited in support of this contention raised, and on general ground I am quite unable to accept the view that the mere fact that the Sanad has been issued is sufficient to give rise to the cause of action to which the suit relates.

It may be that he might have been able to institute a suit for a declaration that it was not Jat-inam property but Devasthan property soon after the Sanad was granted; as to that I express no opinion. But I do not think that the fact that the Sanad was granted rendered it necessary for him to institute the present suit. The article 120 does not apply to the case, as there is a claim for possession.

It is also clear that the amendment of the plaint was very properly allowed. It would be quite wrong to allow the strangers who are alienees to continue to hold possession of the Devasthan land, and if the Court came to the conclusion that it was Devasthan property, it was quite proper to order defendants Nos. 29 and 30 to restore the possession to the plaintiff. It is not necessary for us to consider in these appeals whether the plaintiff is entitled to possession in preference to defendant No. 1, who held the lands originally and alienated the same to defendants Nos. 29 and 30. Defendant No. 1 has not appealed and he has not appeared either before the lower appellate Court or before us.

It is urged, however, by the plaintiff by way of cross-objections against defendant No. 27 that though he has been rendering services to the temple, the fact that he contended that the lands in suit were not Devasthan land but the private property of the Devlis was sufficient to entitle him to the possession of the lands from the temple servants.

Both the lower Courts have declined to give effect to this plea in the exercise of their discretion. In my opinion they were perfectly justified in declining to give possession to the plaintiff and in not depriving the defendants of their possession of these lands which have been in their possession for many years as remuneration for their services which they have been rendering to the temple, and which they are still ready to render.

On these grounds, I am of opinion that the appeals must fail.

The result is that the decree of the lower appellate Court is confirmed and the appeals and cross-objections are dismissed with costs.

Crump, J.—I agree.

Appeal and Cross-objections dismissed.

A. I. R. 1922 Bombay 440.

MACLEOD, C.J. AND COYAJEE, J.

Chunilal Someshvar Bhatt—Plaintiff-Appellant.

v.

Vithaldass Karsandas.—Defendant-Respondent.

S. A. No. 502 of 1921 decided on 16th February 1922 from the decision of D. J., Ahmedabad, in A. No. 263 of 1919.

(a) *Registration Act, S. 17—Equitable mortgage by deposit of title deeds—Writing evidencing the charge is not admissible without Registration.—T.P. Act, S. 59.*

Defendant borrowed in Bombay a sum from plaintiff on depositing with him the title deeds of his house outside Bombay. The transaction was recorded in a writing which recited the loan and the deposit and proceeded as follows, " In security of that we have given our one house in Godhra In mortgage for the above amount. And we have also given to you the copy of the record. We shall execute a *pacca* document in respect of the same whenever you may ask us. Its interest is settled at 8 annas. It is agreed that you should return to us the copy of the record on paying the above amount . . ."

Held that this writing required registration, as it is a complete transaction and is itself nothing less than a mortgage. The plaintiff therefore, was not entitled to a declaration that he had a charge on the property mentioned in the title deeds deposited with him or to an order for sale thereof or to obtain a mortgage deed from the defendant. [P 442, C. 2.]

(b) *Practice—Pleadings—Relief—Claim on mortgage—Personal Decree can be given.*

Where a mortgage was found invalid for want of registration, but the defendant admitted the amount as due it was open to the Court to pass a decree against its defendant for that amount personally [P. 442, C. 2.]

G. N Thakor—for Appellant.

M. H. Mehta—for Respondent.

Macleod, C. J.—The plaintiff sued to recover Rs. 1,000 principal and Rs. 69-5-0 interest thereon, by sale of the mortgaged house mentioned in the plaint situated at Godhra, or in the alternative for a registered mortgage deed thereof, alleging that he had advanced that sum to the defendant to enable him to carry on trade in Bombay, and in consideration thereof the defendant deposited the title deed of his house at Godhra and created an equitable mortgage thereon for Rs. 1,000. The defendant on the same day passed in Bombay a *chitti* in respect thereof. The defendant admitted the payment of Rs. 1,000 on the 19th November 1917, and alleged that that amount was to be accounted for in the partnership account at the end of the year, and he further contended that the equitable mortgage and the agreement relied upon by the plaintiff did not come within the jurisdiction of the Court, as the agreement took place in Bombay, the amount was paid in Bombay, and the defendant was doing business in Bombay and residing in Bombay.

The trial Court held that the Court had jurisdiction to try the suit, but as the *chitti*, Ex. 12, on which the plaintiff relied, required registration, the suit failed. This decision was confirmed in appeal, and before us it has been argued, in the first place, that the defendant admitted that there was an equitable mortgage of his property, and therefore, the plaintiff on that admission was entitled to the decree he asked for.

But I do not think it can be said that the defendant's pleading admits that there was an equitable mortgage which could be the basis of a decree. He merely refers in the written statement to the plaintiff's allegations and mentions what the plaintiff relies upon for establishing the creation of an equitable mortgage in Bombay.

Then it has been very strenuously urged that the document Exhibit 12, does not require registration: and in order to determine whether it requires registration, we have to consider upon the proper construction of that document whether it creates a charge or an interest in the property mentioned therein; and with reference to documents connected with the deposit of title deeds, what the Court has to consider is laid down in *Shaw* v *Foster* (1), referred to in the judgment of the Privy Council in *Pranjiwandas Jagjiwandas Metha* v. *Chan Ma Phee* (2).

" Although it is a well established rule of equity that a deposit of a document of title, without more, without writing or without word of mouth will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is " put out of the case and reduced to silence by the document by which alone you must be governed."

In the case before the Privy Council the question was what was the scope and extent of the security, as the title-deeds of several properties had been handed over and the document accompanying them only referred to one

(1) (1872) 5 H L 321=20 W. R. 907 =42 L J. Ch. 49.

(2) A. I. R (1916) P C 115=43 Cal. 895=43 I. A. 122=8 L. B. R. 458= (1916) 1 M W N. 443=31 M. L. J. 155=4 L. W 69=14 A. L. J. 638= 20 C. W. N. 925=18 Bom L. R 664 =20 M. L. T 242=9 Bur. L. T. 125 =24 C. L. J. 314 (P. C.).

property. The question whether the document required registration was not before their Lordships.

It is difficult to see how Exhibit 12 can be considered as anything less than a mortgage, considering that it states after reciting the taking of Rs. 1,000:

"In security of that we have given our one house in Godhra bearing Municipal No. 292and with superstructure beingSanad No. 7, measuring 85 sq. yds. in mortgage for the above amount. And we have also given to you the copy of the Sanad. We shall execute a *pacca* document in respect of the same whenever you may ask us. Its interest is settled at the rate of eight annas. It is agreed that you should return to us the copy of the Sanad on paying the above amount. This is agreeable and binding on us."

If that document had been registered, and the mortgagor had thereafter sought to deal with the property, there can be little doubt that the plaintiff would have set up this document as conferring upon him a prior title. If there had been no document accompanying the title deed, then it would have been open to the plaintiff to prove orally what was the intention with which the document was deposited, and whether it was meant to be considered as a security.

But as the defendant executed this document, we must refer to it in order to ascertain what was the contract. The fact that the defendant agreed to execute another document in formal terms, if he was asked for one, does not affect the value of the document signed, provided it is evidence of a complete transaction which can be spelt out of its wording. There is a certain class of cases in which the parties only purport to record the terms of the agreement in an informal manner, intending that the formal expression of the oral agreement should be executed thereafter.

But if the first document contains everything that is necessary for the purpose of proving an agreement then the first document takes effect, unless it is stated to be a condition of the first document that it should not take effect unless the second document is executed. But in this case, there is a complete contract to be found in Exhibit 12 although the plaintiff had a right to obtain a mortgage deed drawn up in more formal language. It seems to me, therefore, that the Courts below were right in deciding that Exhibit 12 required registration.

Reference was made to the case of *Behram Rashid* v. *Sorabji Rustomji* (3) which was decided by Mr. Justice Beaman and myself, and there Mr. Justice Beaman very clearly points out the way in which contemporaneous writings of this kind should be dealt with.

The whole point is whether the document created a charge upon the property referred to therein, and once there is a writing with reference to the deposit of title deeds, then it is quite clear that the Court must refer to that writing, and can refer only to it, in order to determine what were the conditions on which the title-deeds were deposited. The plaintiff, therefore, was not entitled to a declaration that he had a charge on the property mentioned in the title-deeds deposited with him, or to an order for sale of that property to satisfy his claim, nor do I think he was entitled to obtain a mortgage deed from the defendant, as, if my construction of the deed is correct, he had already got a mortgage, and the only effect of his getting another document would be to have the terms of the mortgage settled in a more formal manner.

Therefore, if the first transaction is not registered he could not by getting another document cure the defect. But as the defendant admits the advance, it is certainly open to the Court to consider whether a decree should not be passed against the defendant personally. It is true that the learned trial Judge says that the plaintiff does not want a decree against the defendant personally, but wishes to proceed against the mortgaged property only. But it is not clear that the plaintiff was given an opportunity of endeavouring to prove that he was entitled to a personal decree against the defendant if he failed to get a decree against the property.

I think he ought to have an

(3) (1913) 38 Bom. 372=16 Bom. L. R. 35=23 I. C. 140.

opportunity of doing so, and therefore, the suit should go back to the trial Court for a decision on the issue whether the Court has jurisdiction to pass a personal decree against the defendant, and if so, whether such a decree should be passed.

We set aside the order dismissing the suit to that extent. The appellant must pay the costs of the appeal.

Coyajee, J.—I agree.

Case remanded.

A. I. R. 1922 Bombay 443.

MACLEOD, C. J. AND SHAH, J.

Abdul Hussain Adamji Masalawalla—Defendant-Appellant.

v.

Mahomedally Adamji Masalawalla—Plaintiff-Respondent.

O. C. J. Appeal No. 73 of 1921 decided on 7th November, 1921 from Order of Kincaid, J. in Suit No. 3062 of 1920.

Letters Patent (Bombay), Cl. 12—Administration suit is not a suit for land—Part of the property outside original jurisdiction of High Court—Suit is not incompetent.

An administration suit is not a suit for land within the meaning of cl. 12. The High Court, therefore, has jurisdiction to try an administration suit though part of the estate of the deceased consisting of land is outside its Ordinary Original Civil Jurisdiction. But the Court cannot decide as to who is entitled to property outside its Ordinary Original Civil Jurisdiction. [P, 443, C. 2.]

Jinnah and *Kania*—for Appellant.
Desai—for Respondent.

Macleod, C. J.:—We think that the Judge was right in holding that the suit being an administration suit could go on even although it appeared that there were immoveable properties, alleged to belong to the estate, outside the jurisdiction, as in our opinion an administration suit is not a suit for land. It is only when the reference commences before the Commissioner on the accounts being filed that it can be ascertained what are the contentions of the parties and whether the accounts filed together with the objections and surcharges show that there are properties either inside or outside the jurisdiction belonging to the estate.

When claims to such properties are raised before the Commissioner, then it is a matter for him to decide what action to take and even if he is of opinion that he has jurisdiction to decide questions of title to immoveable property, it will be open to the parties to ask him to make a reference for the opinion of the Court, when the Court will be in a position to decide how the disputed questions of title should be tried. But it certainly does appear that the first declaration in the decree should not have been inserted as it is not in consonance with the judgment. From the declaration now appearing in the decree that the Court had jurisdiction to administer the said Kurla property, it would appear that the Court had already decided that the question to whom the Kurla property belonged should be dealt with in this suit.

But that, as I have pointed out, is a question which falls to be decided hereafter. That an administration suit is not a suit for land seems to us to be obvious from the difficulties which might arise if the opposite contention should prevail. If an administration suit is a suit for land, because it is alleged that part of the estate consists of land, leave would have to be obtained when part of the land was outside the jurisdiction, but if all the land mentioned in the plaint appeared to be outside the jurisdiction, such land could not be dealt with in the suit although afterwards it was proved that part of it was within the jurisdiction.

A similar difficulty arises in this very suit, because all the properties mentioned in the particulars of the plaint were outside the jurisdiction and no leave could have been granted. Now one party alleges that a property not mentioned in the proceedings which is within the jurisdiction belongs to the estate; and if the suit must be treated as a suit for land, then leave ought to have been obtained before the suit was filed, and once the suit is filed without obtaining leave, if leave is necessary, the defect cannot be remedied.

The order, therefore, which we make on the appeal is that the decree be amended by striking out the first

declaration.

Costs of the appeal to be costs in the suit. *Decree Varied.*

A. I. R. 1922 Bombay 444

MARTEN, J.

James Mackintosh and Company—Petitioners.

v.

Scindia Steam Navigation Co. Ltd—Opposite Party

Arbitration Case No. 18 of 1922 decided on 19th May 1922.

(a) *Arbitration Act—Court has no power to issue commission to witness to give evidence before private arbitration.*

Civil Courts have no power under the Act or under rules of this High Court made under the Act to issue a summons or commission to a witness to give evidence in a private arbitration Consent of parties cannot confer this power. [P. 444, C 2]

(b) *Civil P. C S. 75 and O, 26, Rr. 1 to 4—Powers of Court under, can be exercised only in a suit and not otherwise.*

S. 75 does not give the Court power to issue a commission to examine anybody anywhere and before any private person whether or not any suit has been instituted. For instance, this section would not give the Court power where there was no pending suit to direct a private citizen to appear, before, say a Punchayet of some particular caste to give evidence on some caste dispute. Nor could the Court require a private citizen in a similar case to appear before the Club Committee or any other private domestic tribunal; nor for the matter of that before, say a Government departmental commission. This section must be qualified by the rules in the First Schedule, subject of course to such further rules as may be found in the High Court Rules. [P. 445, Col. 2].

(c) *Civil P. C S. 151—Court has no power to summon witness before a private person.*

To summon a private citizen to give evidence before another private citizon is not within the inherent jurisdiction of a Court [P. 447, C. 1)]

(d) *Jurisdiction—Consent—Cannot give.*

The argument that the consent of parties would give the Court jurisdiction is a very dangerous argument to use. [P. 448, C. 1].

Little—for Applicant.

Marten, J.—I have to thank Mr. Little, the solicitor for the applicants, for his interesting and valuable argument in Chambers on a point which is both novel and important. The application is for the issue of a commission to Calcutta for the examination of witnesses in a private arbitration, and the point is whether this Court has any jurisdiction to make the order.

Now in India parties who wish to resort to arbitration have two alternatives. They can either get the direct assistance of the Court from the outset, or they can arbitrate without the intervention of the Court. In the former case, they can proceed under the Second Schedule to the Civil Procedure Code. In that event the present difficulty would not arise, for under S. 7 of that Schedule the Court would have power to issue the same processes to the parties and witnesses whom the arbitrators desire to examine, as the Court might issue in suits tried before it. Accordingly in *Rabiabai* v. *Rahimabai* (1) Mr. Justice Tyabji decided that in such an arbitration case, it was competent to the Court to issue a commission for the examination of witnesses.

But the present case is not one of that description. It is an arbitration without the intervention of the Court and it comes under the Indian Arbitration Act 1899 the preamble of which runs: "Whereas it is expedient to amend the law relating to arbitration by agreement without the intervention of a Court of Justice." That Act however, does enable the parties to get the assistance of the Court in certain limited particulars.

For instance, under S 10 the arbitrators have power to administrate oaths to witnesses and to state a case for the opinion of the Court. Under S. 12 the Court has power to enlarge the time for making an award; under S. 13, to remit the award for reconsideration; under S. 14, to set aside the award for misconduct etc; and under S. 16, to remove arbitrators for misconduct. Then under S. 15 when an award has been filed in Court it is enforceable as if it were a decree of the Court. Section 20 provides for rules to be made by the Court.

Then the First Schedule to the Act provides for certain matters to be implied in submissions to arbitration, unless otherwise negatived.

Clause 6 provides that the parties to the reference and all persons claiming through them shall "submit to be examined" by the arbitrators on oath, and to produce documents. Clause 7 runs: "The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath."

It will be noted, therefore, that there is not a word about the compulsory summoning of witnesses: nor a word about commissions and that this is in direct contrast with S. 7 of the Second Schedule to the Civil Procedure Code which I have already mentioned. Further, we know that the Indian Arbitration Act is largely a copy of the

(1) (1905) 7 Bom. L. R. 560.

English Arbitration Act, S. 8 of which provides that "Any party to a submission may sue out a writ of subpoena *ad testificandum*, or a writ of subpoena *duces tecum*." No such provision for the issue of subpoenas by this Court in a private arbitration is provided in the Indian Act.

Next I turn to our own Rules of this High Court. They are Rules 351 to 360 under the Indian Arbitration Act. There is nothing there about summoning witnesses in this way nor about a commission. The only rule I need notice is Rule 352 which provides for all applications being "made by petition except as hereinafter provided otherwise." Therefore it would seem from a technical point of view that this particular application should have been made by petition and not on a mere request contained in an affidavit. However that is merely a technical point, and could easily be put right by the presentation of a petition.

Then if we turn to Rules 340 to 345 they provide for the examination of witnesses *de bene esse* and for a commission under Order XVIII, Rule 16, and Order XXVI, Rule 1 of the Civil Procedure Code. There is nothing else to which my attention has been drawn in our Rules which are material to be mentioned on this point. Then if I return to the Civil Procedure Code I find it is perfectly clear that these examinations *de bene esse* under Order XVIII, Rule 16 and also any commission under Order XXVI, rules 1 and 4 are only to be granted in "suits."

I may refer to the note which I think is correct in Mr. Mulla's Code at page 697 where he says: "A commission can only be issued in the cases specified in this rule and rules 4 and 5 below, and in no other case." Similarly, when one considers the question of summoning witnesses one finds that under Order XVI, rule 1, there is power to summon witnesses after "the suit is instituted." The present application is clearly not in a suit.

Next if one turns to Order XXVI, rules 16 and 17, dealing with commissions, one finds that any commissioner who is appointed has express power to examine witnesses and "any other person whom the commissioner thinks proper to call upon to give evidence." Under rule 17 the provisions of this Code relating to the summoning, attendance and examination of witnesses shall apply to persons required to give evidence under this Order and that "for the purposes of this Rule the commissioner shall be deemed to be a Civil Court."

Then sub-rule (2) provides for certain powers to the commissioner to apply to local Courts other than the High Court for issuing processes against a particular witness where necessary. Once more then one finds these powers expressly given, and not depending on any implication or alleged inherent powers.

Now there is a section in the Civil Procedure Code, S. 75, which is in rather wider terms. Section 75 provides that "Subject to such conditions and limitations as may be prescribed, the Court may issue a commission (*a*) to examine any person; (*b*) to make a local investigation; (*c*) to examine or adjust accounts; or (*d*) to make a partition." Section 76 gives power to issue a commission to another Court not being a High Court. Section 77 deals with letters of request in lieu of commissions for the examination of witnesses at any place not within British India. Section 78 provides for commissions issued by foreign Courts. But it must be remembered that under S. 121 the rules in the First Schedule are enacted as part of the Act and S. 75 in my opinion cannot be read as giving this Court power to issue a commission to examine anybody anywhere and before any private person whether or not any suit has been instituted.

For instance, I do not think this section would give the Court power where there was no pending suit, to direct a private citizen to appear before, say, a Punchayet of some particular caste to give evidence on some caste dispute. Nor I think could the Court require a private citizen in a similar case to appear before a Club Committee or any other private domestic tribunal. Nor for the matter of that before, say, a Governmental depart-

mental commission. I think then that this section must be qualified by the rules in the First Schedule which I have referred to subject of course to such further rules as may be found in our own High Court Rules. Therefore, as far as the rules and the express powers of this Court are concerned, I find nothing express which would enable me to grant this present application.

An appeal is next made to the inherent jurisdiction of the Court under S 151 of the Civil Procedure Code. When such an appeal is made, I think the Court must be particularly careful to consider the principles involved and what the application really means. I have in my mind a judgment given sometime ago by Mr. Justice Chitty in a case under the Settled Lands Act, where after an application, under the ordinary provisions of the Settled Lands Act for leave to do something in relation to the settled property, had failed, counsel Mr. Upjohn next applied to the Court to sanction the proposal under the inherent jurisdiction of the Court. Mr. Justice Chitty then gave a forcible and salutary warning against too great a readiness to accept such an argument, however specious.

In the present case I think the Court has to be particularly careful in making the order; because there is no opposition from any of the parties to this arbitration; and if it was a case, under the Second Schedule to the Civil Procedure Code, the facts would undoubtedly justify the commission being granted. On the merits, and irrespective of jurisdiction, I am quite satisfied that it is a proper case for the assistance of the Court. I may say at once that if I felt myself able to grant this assistance, I would undoubtedly give it to these business men.

Now going back to principles, when a party appeals to the alleged inherent jurisdiction of the Court to grant a commission in a private litigation, what do our Courts exist for? Our Law Courts exist for deciding the litigation of the country. For that purpose it is reasonable and necessary that the Court should have power to summon witnesses before it and to examine them. But summoning a private citizen to give evidence before another private citizen seems to me to be quite another matter. I do not see where the inherent jurisdiction comes in there at all. No doubt in course of time this difficulty was felt in arbitrations and that is why there has been legislation both in England and in India to assist in some respects parties resorting to a private arbitration.

It is perfectly clear that in some cases that may be a convenient and speedy way of settling disputes, for instance, in disputes as to whether goods are up to sample. But the Legislature in granting this assistance in private disputes has been extremely careful to limit the Court's powers. I will not repeat it again but I have already contrasted S. 7 of the Second Schedule of the Civil Procedure Code with the very limited powers given in Indian Arbitration Act about witnesses.

Further, it is perfectly clear that the Arbitration Act does not apply to all cases. You have got to bring your arbitration within the four corners of the Act, and if certain events arise which are not covered by the Act, then the parties are left without any remedy, and the Court has no jurisdiction to remedy the defects under the Arbitration Act. This is exemplified by a case decided by the Court of Appeal in our Courts in *Gopalji* v. *Morarji* (2).

That was a case where three arbitrators were appointed. They all after entering on the arbitration either retired or refused to continue, and then there was an application made to the Court to appoint new arbitrators in their place. If it was a case of doing justice or of the inherent powers of the Court, supposing the express provisions of the Act did not apply, you would have thought that that was eminently a case where the power should be exercised, because otherwise the whole of the arbitration would be entirely abortive.

The case came before me in the first instance, and although it was clear that one coach and four had already been driven

(2) (1919) 43 Bom. 809=50 I. C. 411 =21 Bom. L. R. 308.

through the Act, I thought I could see my way, to prevent another gap being made in the useful provisions of the Act, and that I could construe the provisions in such a way as to fill up the vacancies. However, the Court of appeal took a different view, and held that the Act only enabled the Court to fill up vacancies in the case of a single arbitrator or two arbitrators but not in the case of three. Consequently the arbitration proved abortive. Mr. Justice Hayward in his judgment pointed out that the Act conferred special powers on the Court, and that those powers do not exist under the inherent jurisdiction. He says at p. 326

"The appeal involves a point of importance. The Indian Arbitration Act applies to the appointment of a single arbitrator and in certain cases to the appointment of two arbitrators. Does it apply in any case to the appointment of three arbitrators. It is important to remember in resolving this point that the Act is an Act to amend the law relating to arbitration. It does not deal with the whole law of arbitration and it must be construed strictly in that it confers special powers of interference not otherwise inherent in the Court."

The statement of the law is, I think, directly opposed to the argument which has been addressed to me as to the inherent jurisdiction of the Court. If it is necessary for the ends of justice in the present case to grant a commission to examine witnesses, surely it was also necessary for the ends of justice to fill up the vacancies in the other case. And I may point out as showing the niceties of the distinctions which this badly drawn Act has caused, that in *In re Babuldas Khemchand* (3) Mr. Justice Pratt stayed an action where there were three arbitrators and refused to adopt the argument that the Act did not apply at all where there were three arbitrators. In other words he held that an arbitration where there are three arbitrators, may be a good arbitration under the Act, although in certain cases you cannot fill up vacancies that may occur in those arbitrators

(3) A.I.R. (1921) Bom. 185=45 Bom. 1.

I next turn to English authorities which, I think, I may fairly do, because, as I have said, the Indian Arbitration Act is practically taken from the English Act, and there is much in common between the two rules of procedure. There the exact point has been decided in a manner adverse to the present application. I refer to *In re Shaw Ronaldson*, (4) where the head note is as follows: "Where parties agree to refer their disputes to arbitration, no action having been brought in respect of those disputes, the Court or a Judge has no power under Order XXXVII, rule 5, to order the issue of a commission for the examination of witnesses in the matter referred to arbitration."

That was decided by Mr. Justice Mathew and Mr. Justice Collins as they then were. As we all know, few people knew more about the Law generally than Lord Justice Mathew. He was indeed the originator and the first Judge who sat in the modern Commercial Court in the High Court in England. Mr. Justice Collins, who was afterwards the Master of the Rolls, was also, if I may say so with all respect, a brilliant commercial and common law lawyer.

When then I find these two learned Judges holding that the Court has no jurisdiction, that decision, in my opinion, is entitled to the greatest weight In that case they decided that a private arbitration was not a "cause" or a "matter" under the Rules or Acts there cited. The corresponding word in our Code is "suit." There is no 'suit' before me. It is only a private arbitration.

Then there is another case of *In the matter of an arbitration between Dryfus & Sons and R. & W. Paul.* (5) In that case Mr. Justice Collins refused in a private arbitration to grant a commission to examine witnesses. The case went on appeal, where, from the interlocutory observations made by the learned Judges, it was clear they had the greatest doubt as to the jurisdiction. Eventually the appeal

(4) (1892) 1 Q. B. 91=61 L. J. Q. B. 141.

(5) (1893) 9 T. L. R. 358.

was dismissed on the ground that the application on its merits showed no ground for the exercise of the Court's discretion. That case can in no wise help the present application. If anything, it is against it.

In England, just as in the case decided by Mr. Justice Tyabji which I have referred to, it has been held that where once there has been a suit and the suit has been referred to a referee for trial then the Court has power to issue a commission. See *Hayward* v. *Mutual Reserve Association* (6).

Then if I turn to the recognized text books, I find in Russell on Arbitration, 10th Edition, at page 138, it is stated definitely that " in the case of a reference by consent, the Court has no power to order a commission to issue for the examination of witnesses abroad." Similar statement appears in Halsbury's Laws of England, Vol. I, p. 458, note (*h*) and on other pages.

, Now against all that, the only precedent or authority for the order which I am asked to make is an order made by Mr. Justice Kanga in Chambers a short while ago when he was acting temporary Judge of this Court. I am told the learned Judge did raise the question of jurisdiction and considered the papers for some three or four days. But there is no delivered judgment, and I am not aware what were the reasons which induced the learned Judge to grant the commission in that particular case.

In any event a decision of that sort in Chambers, where no note of the judgment has been kept and where I have no notes of the argument (if any), is not in any way a precedent binding upon me, least of all when it is a question of jurisdiction. And with due respect to the learned judge I find myself unable to follow the decision.

One other argument urged upon me was that the consent of the parties would give the Court jurisdiction. That to my mind is an extremely dangerous argument to use. It was admitted that I could not issue this commission, supposing there was opposition. Let me test this admission. If it is necessary for the ends of justice that, under the inherent jurisdiction of the Court, I should grant a commission to examine witnesses in Bengal, then what possible difference can it make whether all the parties consent to it or not. If for instance it is essential for the plaintiff to call certain witnesses, surely it is only right that they should be called quite irrespective of whether the defendant agrees that they should be called. I cannot see what the defendants' consent has got to do with the power of the Court.

Many people are carried away with the erroneous idea that because two parties agree on any particular course that necessarily gives the Court jurisdiction to make the order. They some times go so far as to suggest that the Court is bound to make the order in such a case. Here I am asked to affect the rights of private citizens who occupy certain important public posts, *viz.*, certain officers of the Port of Calcutta. They are not parties to the arbitration. So it is not a question merely between the parties to a private arbitration.

I am asked in effect to allow private litigants to summon these particular Port Officers before them and to oblige them to produce documents and so on. So I am affecting the rights of other citizens, and it is not merely a question, of what these particular parties want me to do.

After considering carefully all the arguments that have been addressed to me, I am of opinion there is no jurisdiction in this Court to grant a commission to examine witnesses in a private arbitration and still less so, when the commission is to be sent to another Province.

I accordingly refuse the application.

As regards costs, costs of all parties will be costs in the arbitration.

Application refused.

(6) (1891) 2 Q. B. 236 = 39 W. R. 624 = 55 L. T. 491

A. I. R. 1922 Bombay 449 (1)

SHAH, AG. C. J. AND CRUMP, J.

Lakshmibai Jagannath Joshi and others —Plaintiffs-Applicant.

v.

Yeshwant Vithal Bagkar—Defendant —Opponent.

Civil Extraordinary App. No. 184 of 1921 decided on 15th June 1922 from an order passed by the Sub. J. Dapoli, in Suit No. 242 of 1919.

(a) *Lim. Act, S 5 and Art. 177 and Amending Act XXVI of 1920—Mistake of Law—Application after three months—Delay may be excused—Civil P.C. O. 22, Rr. 9 (2).*

The error that the defendant's heirs were brought on the record more than three months after the death of the original defendant without formally setting aside the abatement of the suit which resulted in consequence of the lapse of three months from the date of the defendant's death, was rightly excused as the application was made within six months, which was the period allowed by the Act of 1908, and the change in the period of limitation effected by Act XXVI of 1920 may not have been and probably was not known to the parties, and the omission to set aside the abatement was a formal defect not affecting the merits of the order.

(b) *Civil P. C. O. 23, R. 1—Grounds for withdrawal.*

An application to withdraw suit with liberty to bring a fresh suit, on the ground that notices on the heirs could not be served, should not be allowed.

P. V. Kane—for Applicants.

K. H Kelkar—for Opponent.

Shah Ag. C. J.—Two points have been urged in support of this application. First it is urged that the defendants's heirs were brought on the record more than three months after the death of the original defendant; and that they should not have been so brought on the record without formally setting aside the abatement of the suit which resulted in consequence of the lapse of three months from the date of the defendant's death. We do not think that there is any substance in this point.

The application was made within six months, which was the period allowed by the Indian Limitation Act of 1908, and the change in the period of limitation which was effected by Act XXVI of 1920 may not have been and probably was not known to the parties. The delay was rightly excused and the omission to set aside the abatment was a formal defect not affecting the merits of the order. Secondly, it is urged that after the parties were brought on the record, the lower Court wrongly allowed the plaintiff to withdraw this suit with liberty to bring a fresh suit on the 28th July 1921.

The application for that purpose was based upon the ground that notices on the heirs could not be served. This is hardly a ground for allowing the plaintiff to withdraw a suit with liberty to bring a fresh suit. It was a suit of 1919 and in July 1921 the heirs were already on the record. There is no reason why the plaintiff should not have made proper efforts to serve the notices upon the heirs and proceeded with the suit. In any case no valid ground for allowing the withdrawal with liberty to bring a fresh suit has been made out.

We set aside the order allowing the plaintiff to withdraw the suit and direct the papers to be sent back to the trial Court in order that the suit may be proceeded with and tried according to law.

Costs of this application to be costs in the suit.

Order set aside.

A. I. R. 1922 Bombay 449 (2)

MACLEOD, C. J.

Jairam Jadowji and others—Plaintiffs —Applicants.

v.

Nowroji Jamshedji Plumber—Deft. Opponent.

O.C.J. Suit No. 381 of 1920, decided on 5th November 1921.

Civil P. C. O. 21, Rr. 97, and 99—Execution—Decree for possession against tenant—Sub-tenant connot resist execution.

A sub-tenant cannot claim to be in possession of property on his own account within the meaning of O. 21, R. 99, and if his immediate landlord is the tenant and judgment-debtor he cannot be in possession on account of some person other than the judgment-debtor.

When a landlord gets a decree for possession against his tenant, and is resisted or obstructed in obtaining possession, it is open to him to apply to the Court to get possession under O. 21, R 97, and if the person resisting or obstructing is in possession as a sub-tenant that person cannot claim under R. 99, that the application should be dismissed.

The words "on his own account" in R. 99, can only refer to a person who claims to be in possession on his own title, or as tenant of some person other than the judgment-debtor. A. I. R. 1922 Bom. 278; 46 Bom 526 roll. 47 Cal. 907 Diss. [P. 450, C. 2, P. 451, C. 1.]

B. J. Desai—for Applicants.

Jinnah—for Opponent.

Macleod, C. J.—The plaintiffs filed a suit against the defendant to recover possession of their property situated at Bhendy Bazar which was in the defendant's occupation as a monthly tenant. A consent decree was passed on the 18th of August 1920, whereby it was ordered that the defendant should give to the plaintiff's possession of the whole of the house mentioned in the plaint, excepting the northern half of the ground floor of the said building then in the occupation of the defendant as a shop and the verandah occupied by a fruit-seller, on or before the 1st September 1920.

The defendant was also ordered to give vacant possession of the said verandah to the plaintiffs on or before the 15th September 1920. The defendant failed to give possession of the verandah occupied by the fruit-seller, so that the plaintiffs applied for execution of the decree and prayed for delivery of possession of the verandah, but the fruit-seller declined to vacate and consequently the plaintiffs were forced to take out this summons against the fruit-seller asking for an order that he should vacate the premises and pay compensation of Rs. 50 per month from the 15th September 1920 till possession was given.

The application is made by the plaintiffs in execution of their decree under Order XXI, Rule 97 (Civil Procedure Code) which says:—

"Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction".

Rule 98 deals with the obstruction caused by the judgment-debtor or by some other person at his instigation. It is not suggested in this case that the fruit-seller is refusing to vacate at the instigation of the judgment-debtor. Rule 99, therefore, applies, which says:—

"Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application."

It must follow that if the Court is not satisfied that the obstruction is being occasioned by a person claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court has the power to grant the application.

Now, the only justification for the fruit-seller being in occupation of the premises is the agreement of tenancy which originally existed between himself and the judgment-debtor. He does not claim to be in possession on his own account, or to be holding on account of some person other than the judgment-debtor.

Under Rule 100 where a person other than the judgment debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or where the property is sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession, so that if the fruit-seller had been dispossessed by the plaintiffs under their decree, he could make an application under Rule 100.

Then under Rule 101 if the Court was satisfied that he was in possession of the property on his own account or on account of some person other than the judgment-debtor, it could direct that he should be put back in possession of the property. It is curious that the words "in good faith" which appear in Rule 99, do not appear in Rule 101. But if this Court was satisfied that the applicant was not acting in good faith, it would be most unlikely that the Court would make an order in his favour, for whether the applicant is the decree-holder or the person dispossessed the same issues arise.

However that may be, it seems to me clear that a sub-tenant cannot claim to be in possession of property on his own account, and, if admittedly his immediate landlord is the tenant and judgment-debtor, he cannot be in possession on account of some person other than the judgment-debtor. It is obvious, therefore, that the execution-

plaintiff is entitled to get possession of th premises from the sub-tenant; and if any other construction were placed on Rules 97 and 99, obstruction could be caused to an execution-plaintiff in a suit for possession in a manner which was never contemplated by the Code.

Mr Jinnah for the fruit-seller relies upon the decision in *Esar* v. *Gubbay* (1). No doubt the learned Judge in dismissing the execution-plaintiff's application held on his construction of Rule 99 that the under-tenant could be said to claim to be in possession on his own account. That, with all due respect, appears to me to require explanation, for I cannot see how it can be said that an under-tenant is in possession of the premises on his own account. And, in my opinion these words can only refer to a person who claims to be in possession on his own title.

Otherwise it would not be necessary to add the words "on account of some person other than the judgment-debtor." The person in possession may either claim to be in possession on his own title or as tenant of some person other than the judgment-debtor. But if he claims to be in possession as a tenant of the judgment-debtor, then it seems to me that the Court is bound to make the order in favour of the execution-plaintiff. Otherwise a landlord may get a decree for ejectment against his tenant but may find that decree an absolute nullity if his tenant had sub-let the premises, as he may have again to file a suit against the sub tenant.

I have already held that sub-tenants, though they may claim the benefit of the Bombay Rent Act against their immediate lessor, cannot claim it against the owner of the premises: see *Juffer ji Ibrahimji* v. *Miyalin Mangal* (2) When a landlord gets a decree for possession against his tenant, and is resisted or obstructed in obtaining possession then it is open to him to apply to the Court to get possession under Order, XXI Rule 97, and if the person resisting or obstructing is in possession as a sub-tenant that person cannot claim under Rule 99 that the application should be dismissed.

The summons, therefore, will be made absolute with costs.

As regards the summons of 3rd October 1921, it will be discharged The defendant to pay by way of compensation the rent payable by the fruit-seller to him until vacant possession is delivered to him. No order as to costs on this summons.

Summons made absolute.

(1) (1920) 47 Cal. 907 = 60 I. C. 969.
(2) A.I.R. 1922 Bom. 273 = 46 Bom. 526 = 23 Bom. L. R. 1251.

A. I. R. 1922 Bombay 451.

SHAH, AG. C. J. AND CRUMP, J.

Ramlingappa Rudrappa and others—Defendants Appellants.

v.

Dhondi Subrao Kutre—Plaintiff—Respondent.

F. A. No. 6 of 1922 decided on 22nd August 1922 from an order of D. J. Belgaum in A. No. 51 of 1920.

(a) *Adverse possession—Equity of Redemption—Clear evidence is necessary.*

It is true that adverse possession of an intangible right such as the equity of redemption is possible and that in law a title to such a right can be acquired by adverse possession. But it would require strong and clear evidence to make out the plea.

Where a minor transferred the equity of redemption in 1899 and the transferee redeemed the mortgage in 1908 and got possession, from the mortgagee who was in possession prior to 1908, *held* that the transfer by the minor being void, the equity of redemption, such as was possible under the circumstances, between 1898 and 1908, must be deemed to be with the rightful owner and that the adverse possession of the transferee, if any began to run only after 1908. [P 453, C 1]

(b) *C. P. C., O. 34—R. 1—Suit for redemption—Part-owner of Equity of redemption is a necessary party.*

In a suit for redemption the plaintiff is bound to implead all part-owners of the equity of redemption as parties. [P. 453, C. 2.]

Nilakant Atmaram—for Appellants.

S. Y. Abhyankar—for Respondent No 1.

Shah, Ag. C. J.—The property in suit originally belonged to one Subrao. He mortgaged it to one Balwantrao in January 1898. Subrao died in January 1899. In March 1899, his eldest son Appaya sold the equity of redemption in five out of six lands to Govind Ganesh and Govind conveyed his interest to Hanmant on May 26, 1908. In July 1908, Hanmant sold his interest in these lands to the father of defendants Nos 1 and 2. In 191-, Appaya sold the equity of redemption to defendant No. 5 in the remaining land.

The plaintiff, who is the younger

brother of Appaya, filed the present suit in August 1918 for the redemption of the mortgage in favour of Balwant by Subrao, alleging that Appaya was a minor when he conveyed his interest in the lands to Govind in March 1899; that he himself attained majority within three years prior to the date of the suit, and that he was entitled to redeem. It appears that the mortgage in favour of Balwant was redeemed by the father of defendants Nos. 1 and 2 who claimed to have purchased the equity of redemption in respect of the five lands, and against defendant No. 5 who purchased the equity of redemption in respect of the remaining land from Appaya.

The issues were not clearly framed, and only the following two issues were dealt with by the trial Court:—(1) What is the age of the plaintiff? and (2) Is the suit bad because it does not contain a prayer for setting aside the sale-deeds? It was found that the claim was barred because the plaintiff attained majority more than three years before the date of the suit, and that as there was no prayer to set aside the sale-deed, the suit was bad.

The plaintiff appealed to the District Court which found that in fact Appaya was a minor at the date of the conveyance in favour of Govind, *i.e.*, on March 7, 1899, that the sale in favour of Govind was void, and that it did not require to be set aside The learned Judge, therefore, came to the conclusion that the suit required to be dealt with on the merits as regards the lands in respect of which the equity of redemption was conveyed to Govind. But as regards the land conveyed to defendant No. 5, the learned Judge was of opinion that even though the suit was within time, as there was no prayer to set aside the sale, the plaintiff's suit ought to be dismissed.

This is rather an anomalous result; because it means that though the plaintiff may claim redemption of the whole mortgage as against defendants Nos. 1 and 2, and get back the mortgaged lands in their possession, the equity of redemption in a part of the mortgage property conveyed to defendant No. 5 would remain outstanding. The learned Judge dismissed the suit as regards defendant No. 5 and remanded it as regards the other defendants for disposal on the merits.

The plaintiff has not appealed against the dismissal of the suit as regards defendant No. 5. But the present appeal is preferred by defendants Nos. 1 and 2 from the order of remand. It is urged by Mr. Nilkant, on behalf of the appellants, that the finding as to the age of Appaya should not be accepted in this appeal Further, it is contended that even if Appaya was a minor, the plaintiff's claim is time-barred, because defendants Nos. 1 and 2 have acquired a title to the equity of redemption by adverse possession during the interval from 1899 to the date of the suit.

It is urged by way of reply that though no issue was raised as to the age of Appaya in the trial Court expressly, the fact was in controversy between the parties, that evidence was adduced by them on the point, that the omission to frame an express issue on the point has not prejudiced the parties in any way, and that it is really a question of fact as to whether he was a minor at the date or not.

It is also urged that the point as to adverse possession of the equity of redemption was not raised in either of the Courts below, and that even if the adverse possession commenced in 1899 it would not avail the appellants, as the learned Judge has found that the plaintiff has filed the present suit within three years from the date of his attaining majority.

As regards the first point as to the finding regarding the age of Appaya, it seems to us that it must be accepted as a finding of fact under the circumstances of this case. It is quite possible that this fact, which was undoubtedly in dispute between the parties, was thought to have been sufficiently covered by issue No. 1 which was as follows:—"Do defendants Nos. 1, 2 and 5 prove the sale-deeds relied on by them, and are they binding against the plaintiff?" It also appears from the evidence referred to in the course of the argument that evidence was adduced on the point

We do not think that having regard to all the circumstances there is sufficient reason to allow the contention of the appellants that a fresh opportunity should

be given to the defendants to adduce evidence on the point simply because an express issue was not raised. If that fact is accepted, as it seems to us it must be accepted as found by the lower appellate Court, *viz.*, that Appaya was a minor at the date of the conveyance by him in favour of Govind, it is decisive of the present appeal.

The second point which has been raised by Mr. Nilkant does not appear to us to be a point of any substance. In the first place, it does not appear to have been suggested in the lower appellate Court, and rightly, because it could not be of any practical use to the present appellants, as the learned Judge found that the suit was filed within three years of the date of the plaintiff having attained majority.

Apart from that, it would require a much stronger and clearer indication than we have in the present case of the adverse possession of such a right as the equity of redemption to justify the defendants' contention that they acquired a title to it by adverse possession. It is true that adverse possession of such a right as the equity of redemption is possible, and that in law a title to such a right can be acquired by adverse possession. But that does not mean that on the facts of the present case there is any clear case made out of such possession of an intangible right as would justify the contention that defendants Nos. 1 and 2 acquired that right by adverse possession.

It is quite clear that before 1908 they did not get actual possession of the land in question. From 1898 to 1908 the possession was with the mortgagee, and there is nothing to show that defendants Nos. 1 and 2 or their predecessor-in-title had any kind of possession of the land. If the conveyance in favour of Govind was void, the title and such possession of the equity of redemption as was possible under the circumstances must be deemed to have continued to be with the rightful owner. The present appeal must, therefore, fail. We dismiss the appeal with costs.

At the same time we desire to make it clear that in the plaintiff's claim for the redemption of the mortgage, defendant No. 5 is interested as a part owner of the equity of redemption. Though the claim against him as regards the sale by Appaya has been dismissed by the lower appellate Court, it does not follow that his presence on the record as a person interested in the equity of redemption as regards one of the mortgaged lands is not necessary.

It would be appropriate to keep him on the record as a party treating the question as to the sale-deed by Appaya as finally decided. The parties before us have not referred to this aspect of the question and defendant No. 5 is not a party to the appeal. But we think it right to order that on remand he should be treated as a party to the suit as regards the claim for redemption.

Appeal dismissed.

A.I.R. 1922 Bombay 453

SHAH, AG. C.J. AND CRUMP, J.

In re Badi-uddin Sarfuddin.

Cr. App. for Rev. No. 84 of 1922 decided on 28th June 1922 from the Order of Dt. Mag. Ahmedabad.

Criminal P. C. S. 195 (1) (a)—Subordination—A Court is subordinate to that Court to which appeals from the former Court lie.

The petitioner made an application to the District Magistrate for sanction under S. 195, as an authority to which Mr. Date i e. the Court whose order was disobeyed, would be subordinate. The District Magistrate was of opinion that Mr. Date made his order as a First Class Magistrate and that the Court to which he would be subordinate in that capacity would be the Sessions Court to which appeals from his decisions as a First Class Magistrate would ordinarily lie, and therefore refused to entertain the application.

Held that under clause (a), sub-section (1) of S. 195, if a public servant making the order is a Court, in respect of that order, the Court to which that Court would be subordinate would be the Court to which appeals would ordinarily lie, that is, in the present case, the Session Court and not the District Magistrate. The order of the District Magistrate was therefore right. (1918) 42 M. 64 Foll. [P. 454, C. 1 & 2

G. N. Thakor and *R. J. Thakor*—for Appellant.

Coyajee and *J. G. Rele*—for Opponents.

Shah, Ag. C. J.—In this case the original order which is said to have been disobeyed, was made by the First Class Magistrate Mr. Date. It appears that the present petitioner made an application to the District Magistrate for sanction under S. 195, Criminal Procedure Code, as an authority to which Mr. Date would be subordinate. The District Magistrate was of opinion that Mr. Date made his order as a First Class Magistrate and that the Court to which he would be subordinate in that capacity would be the Sessions Court to which appeals from his decisions as a First Class Magistrate would ordinarily lie. On that ground the District Magistrate refused to entertain the application.

We are not concerned with the application which the complainant subsequently made to the Sessions Court, nor with the result of that application. The present application is against the order of the District Magistrate; and it is urged on his behalf that Mr. Date must be taken to have made his order as a public servant within the meaning of clause (*a*), sub-section (1) of S. 195, Criminal Procedure Code, and that though he was a First Class Magistrate as a public servant he must be taken to be subordinate to the District Magistrate, though as a Court he may not be subordinate to the Court of the District Magistrate within the meaning of S. 195.

On the construction of the section, I do not feel any difficulty in disallowing this contention, but the point has been decided by the Madras High Court in the case of *Arunachalam Pillai* v. *Ponnusami Pillai* (1); and it is needless to deal with it at any length. I accept the view taken in that case and hold that under clause (*a*), sub-section (1) of S. 195, if a public servant making the order is a Court, in respect of that order, the Court to which that Court would be subordinate would be the Court to which appeals would ordinarily lie, that is, in the present case, the Sessions Court and not the District Magistrate. I am of opinion that the order of the District Magistrate is right.

I would discharge the rule.

Crump, J.—I concur.

Rule discharged.

(1) (1918) 42 Mad. 64=35 M. L. J. 454=8 L. W. 422=24 M. L. T. 396=(1918) M. W. N. 824=48 I. C. 878=20 Cr. L. J. 78.

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SHAH, AG. C. J. AND CRUMP, J.

Harischandra Narayan Vinekar—Applicant.

v.

Kumma Vithoba Komarpant—Opponent

Civ. Extraordinary Application No. 73 of 1922 decided on 26th September 1922, from an order of 1st Class Sub-Judge Karwar.

C. P. C., O. 1, R. 10 (2)—Suit for rent by A against B—Impleading of C to enable disputes between B & C to be tried is not proper.

Where the defendant was asked by plaintiff to pay to plaintiff's creditor the rent due from him to plaintiff and defendant paid it to the creditor, who however also recovered the debt from plaintiff under a decree obtained by him against plaintiff, *Held* in a suit by plaintiff for rent, against defendant the creditor is not a proper party. [P. 455, C. 1.]

D. R. Ugrankar—for Applicant.

Shah, Ag. C. J.—This application arises out of a Small Cause Suit in the Court of the First Class Subordinate Judge at Karwar. It appears that the present defendant No. 2, Harischandra had filed Suit No 562 of 1920 against Pandurang in which he obtained a decree against him. At that time it was pleaded by way of defence that Kumma Bin Vithoba, the present defendant No 1, had really paid rent to Harischandra which was then claimed as being payable by Pandurang; but that defence was not believed and a decree was passed in favour of Harischandra.

Thereafter the present plaintiff Pandurang and his daughter, who are Mulgenidars of the Devasthan, filed Suit No. 267 of 1921 in the same Court to recover the rent which would be payable by Kumma defendant No. 1, to them. Defendant No. 1 is admittedly their tenant. The learned Judge finds that the rent was due by him to the plaintiffs and has passed a decree for Rs. 27 against defendant No. 1. But as it appeared from the evidence which was recorded in this suit that as a matter of fact defendant No. 1 had paid this amount

previously to Harischandra, he directed him to be joined as defendant No. 2 to this suit with a view to 'secure justice.'

After joining him as a party, the learned Judge held that defendant No. 1 had paid the rent to defendant No. 2, exactly contrary to the conclusion which he had reached on that point in the previous suit; and in view of that finding he proceeded to pass a decree in favour of defendant No. 1 against defendant No. 2. It is difficult to justify the procedure adopted by the trial Court in this case, as regards the joinder of defendant No. 2, and the ultimate decree passed by the Court in favour of defendant No. 1 against defendant No. 2.

The only question appropriate to this suit was whether defendant No. 1 was liable for the amount claimed by the plaintiffs. The questions as between defendant No. 1 and defendant No. 2 were not appropriate to this suit, and it seems to us that a simple suit has been unnecessarily complicated. Though we appreciate the desire of the learned Judge to do justice, which, no doubt, on the facts found in this case, would go to show that defendant No. 1 was the sufferer, it is difficult to ignore the fact that on a previous occasion the learned Judge did not believe defendant No 1 on that point whatever the merits of the claim as between defendant No. 1 and defendant No. 2 may be, it is quite clear that in this suit such a decree in favour of defendant No. 1 against defendant No. 2 could not be passed.

We, therefore, make the rule absolute and discharge that part of the decree of the lower Court which relates to the payment by defendant No. 2 to defendant No. 1 We also discharge the order of the lower Court with regard to the payment of costs by defendant No. 2 to defendant No 1. We make no order as to costs in this Court and as to the cost of defendant No. 2 in the lower Court.

Rule made absolute.

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SHAH, AG. C. J. AND CRUMP, J.

Abdul Latif Usman—Defendant—Appellant.

v.

Haji Tar Mahomed—Plaintiff—Respondent.

O.C J. App. No. 148 of 1921 decided on 21st June 1922 from an order of Kanga, J.

(a) *Criminal P.C., S. 195—Appeal—Order by a single Judge of High Court, exercising original jurisdiction—Appeal lies to a Bench of two Judges* :

An appeal lies to a Bench of two Judges of the High Court from an order granting or refusing to grant sanction for prosecution for giving false evidence though the order is passed by a single Judge of the same High Court exercising original jurisdiction, as under clause 15 of the Letters Patent, appeals would ordinarily lie from the judgments of a single Judge exercising Original Civil Jurisdiction, to a Bench of two Judges, which is the Court of appeal on the Original Side. It may be that sub-section (7) really provides for the three classes of cases mentioned in clauses (a), (b) and (c) of that sub-section. But those specific provisions are not restrictive of the general rule contained in that sub-section defining subordination for the purpose of S. 195 [P. 456, C. 1, & 2]

(b) *Letters Patent (Bombay), Cl 15-Judgment—Order refusing sanction to prosecute is not.*

It is doubtful whether an order refusing to grant a sanction to prosecute under S 195, Cr. P. C., is a judgment within the meaning of clause 15 [P. 456, C. 1].

Velinkar—for Appellant.

Coltman—for Respondent.

Shah, Ag. C. J.—This is an appeal from the order of Mr. Justice Kanga refusing to grant sanction which was applied for by the defendant in Suit No. 2600 of 1920. The sanction to prosecute was asked for in respect of a letter dated 16th October 1920 (Exh. E), which was said to have been forged and also in respect of a statement made by respondent No. 1 as regards the settlement of the July shipment which was a matter in dispute between the parties. It is not necessary for the purpose of this appeal to state in detail the facts relating to the suit. The suit was decided on the 9th August 1920, when it was conceded by the plaintiffs that there was a settlement in respect of the July shipment.

An objection has been taken on behalf of the respondents that no appeal lies because the subordinate Court contemplated by S. 195, Criminal Procedure Code, is a Court other than a High Court and that therefore there could be no appeal under that section from the order of a Judge of the same Court. It seems to me, however, that the preliminary objection must be disallowed. Sub-section (7) of S. 195 provides that for the purpose of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the judgment of that Court ordinarily lie. In

the present case there could be no doubt that under clause 15 of the Letters Patent, appeals would ordinarily lie from the judgments of a single Judge exercising Original Civil Jurisdiction to this Court, that is the Court of Appeal on the Original Side. It is true that generally speaking the Subordinate Court contemplated by S. 195, Criminal Procedure Code, is a Court different from the Court to which the appeals would ordinarily lie. But, having regard to the words of the section, it seems to me clear that for the purpose of S. 195, the Court from whose order the present appeal is preferred is a Court from whose judgment an appeal would ordinarily lie to this Court: and therefore the present appeal asking us to grant the sanction and to revoke the order refusing to grant the sanction is competent.

It may be, though it has not been suggested, that sub-section (7) really provides for three classes of cases mentioned in clauses (*a*), (*b*) and (*c*) of that sub-section. I do not think however, those specific provisions are restrictive of the general rule contained in that sub-section defining subordination for the purpose of S. 195. It is not necessary for the purpose of this case to decide. whether, apart from S. 195, an appeal would be competent under clause 15 of the Letters Patent. As at present advised I doubt whether an order refusing to grant a sanction to prosecute under S. 195 Criminal Procedure Code, is a judgment within the meaning of clause 15. I base my decision on the preliminary objection upon the terms of S. 195, Criminal Procedure Code.

[The judgment then dealt with the evidence and confirmed the order of Mr. Justice Kanga].

As regards costs, though, generally speaking, it may be desirable not to make any order as to costs in proceedings under S. 195, it seems to me that in this case learned Judge was right in making the order as to costs. After a careful consideration of the circumstances of this case I have come to the conclusion that there is no valid reason why we should deprive the respondents of the costs which the present appellant has rendered it necessary for them to incur without any apparent justification. I would, therefore, dismiss the appeal with costs.

I desire to add that we have treated the proceedings as having been taken under S. 195 of the Code of Criminal Procedure: if the learned Judge considered the matter under S. 476, Criminal Procedure Code, it is clear that there would be no appeal. The rule-*nisi* obtained by the appellants in the trial Court does not in terms refer to S. 195. This aspect of the case was not referred to in the argument, and as both parties treated the case as falling under S. 195, Criminal Procedure Code, we have dealt with it on that footing.

Crump, J.—As to the merits of this case, I do not find it necessary to add anything to the judgment just delivered. But so far as it concerns the question about our jurisdiction to hear this appeal, I should like to say this much. Clause 6 of S. 195 of the Code of Criminal Procedure lays down a general rule as to appeals.

In a case where a sanction has been granted by any authority, such sanction can be revoked or granted by any authority to which the authority giving or refusing it is subordinate. Clause 7 lays down a special rule as regards Courts, and the test of subordination for the purpose of that clause is whether an appeal ordinarily lies from the Court which granted the sanction to the Court which is asked to revoke it.

Now if that is the test, it is, I think, clear that inasmuch as the Judge who heard this matter was sitting as a Court and inasmuch as the appeal ordinarily lies from his judgment by virtue of Clause 15 of the Letters Patent to a Bench of two Judges sitting as a Court, therefore we have here the jurisdiction conferred by Clause 7 of S. 195 of the Criminal Procedure Code. That being so, it is open to us to consider whether the sanction which has been refused here should or should not be granted.

Whether, apart from the provisions of the Code of Criminal Procedure an appeal lies under clause 15 of the Letters Patent from the order refusing sanction, is a question on which I express no opinion.

Appeal dismissed.

THE END.